(26,548)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 472.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, PETITIONER,

vs.

ALFRED H. SMITH.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

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No. 6.

In the Court of Appeals of Maryland.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Body Corporate,

vs.

ALFRED H. SMITH.

Appeal from the Circuit Court for Caroline County.

Filed September 8th, 1917.

Henry R. Lewis, for Appellant.
T. Alan Goldsborough, for Appellee.

1 In the Circuit Court for Caroline County.

No. 11 Trials, April Term, 1917.

ALFRED H. SMITH

vs.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Body Corporate.

T. Alan Goldsborough, Esq., Attorney for Plaintiff.
Henry R. Lewis, Esq., Attorney for Defendant.

Action Commenced March 29, 1917.

Docket Entries.

Case. Rule narr.

1916, Sept. 4th, Narr filed, rule plea.
1916, Sept. 30th, Demurrer to the first, second and eight- Counts of Declaration filed.
1916, Sept. 30th, Plea to the other Counts of declaration filed, rule Repl'n.
1916, Oct. 2nd, Mo. by plaintiff for leave to file an amended narr. Mo. granted. Amended narr filed. Rule plea.
1917, April 5th Mo. by plaintiff for leave to file Amended narr. Mo. granted. Amended narr filed.

1917, April 9th, Mo. by defendant for leave to withdraw and refile demurrer and pleas. Mo. granted. Demurrer and pleas withdrawn and refiled.

Issues on Demurrer joined short.

Demurrer overuled, exceptions noted, pleas filed. Trial, issues joined on pleas short. Jury sworn.

2 1917, April 10th, Mo. by plaintiff for leave to strike out all counts in the Declaration except first count. Mo. granted. Plaintiff's 1st & 2nd prayers granted. Defendant's 1st & 2nd prayers granted. Plaintiff excepts to defendant's 1st & 2nd prayers. Defendant excepts to the plaintiff's 1st & 2nd prayers. Verdict for plaintiff for $4000.00 Judgment on verdict nisi.

1917, April 16th, Judgment on verdict absolute.

1917, June 8th, Order to enter an appeal to Court of Appeals.

1917, June 8th, Appeal bond filed and approved.

1917, June 25th, Petition for extension of time to file Bill of Exceptions and order of Court therein filed before the adjournment of the April Term.

1917, July 31st, Petition and order of Court extending time to file exceptions until Sept. 1st, 1917.

1917, Aug. 29th, Petition and order of Court extending time to file exceptions until Sept. 22nd, 1917.

Amended Declaration.

(Filed April 5th, 1917.

In the Circuit Court for Caroline County.

No. 33 Trials, October Term, 1916.

ALFRED H. SMITH

vs.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Body Corporate.

Alfred H. Smith, by T. Alan Goldsborough, his attorney sues the Philadelphia, Baltimore and Washington Railroad Company, a body corpoate,

First, for that the defendant is and was on the twenty-third day of December, 1915, a common carrier by railroad engaged in

3 commerce between States of the United States, and, as such common carrier by railroad, owned, maintained and operated on the said twenty-third day of December, 1915, a line of railroad extending from Philadelphia, State of Pennsylvania, through the States of Pennsylvania, Delaware, Maryland, and Virginia, to the town of Cape Charles, Virginia, together with various branches of the said road from Philadelphia to the town of Cape Charles, one of which extends from the town of Clayton, in the State of Delaware, through the States of Delaware and Maryland, to the town of Oxford, in the State

of Maryland, the town of Easton, Maryland, being on the said line, (said line passing through Caroline County, Maryland, and the defendant having agents in said County selling tickets), together with the usual locomotive engines, passenger and freight cars and other railroad equipment; that on the aforesaid twenty-third day of December, 1915, the plaintiff was employed by the defendant in interstate commerce, in that he was employed as cook for other employees of the defendant engaged in interstate commerce (chiefly bridge carpenters engaged in building and repairing bridges of the defendant in different States, over which the defendant ran its cars engaged in interstate commerce), his duties requiring him to go back and forth between the States as employment of the aforesaid employees of the defendant for whom he cooked, required; and the plaintiff says that he was employed as a laborer to do any work he was told to do by his superior officer or "boss", he having the same superior officer or "boss" as the other said employees, and that he actually was, at times, assigned to assist in the work of the said other employees of the defendant; and that he and the other employees as aforesaid of the defendant went back and forth between the States of Maryland, Delaware, Pennsylvania and Virginia on a car of the defendant in which car they lived and which car went back and forth between the several said States as aforesaid as the bridges of the defendant, over which ran its cars engaged in interstate transportation, required attention; and the plaintiff says that the work assigned to him principally was

4 to take care of the aforesaid car in which he and the other employees of the defendant ate and slept, to keep it clean, to make the beds, to buy the food, prepare and cook it; that on the aforesaid twenty-third day of December, 1915, the aforesaid car of the defendant was located on the side track in the town of Easton, Maryland, coupled at each end to a car of the defendant, and that certain agents and employees of the defendant engaged in interstate commerce, negligently and carelessly ran an engine of the defendant engaged in interstate commerce with great force into the said cars, throwing the plaintiff, who was cooking dinner for himself and the other employees of the defendant as aforesaid, some ten feet against a door casing and partition, striking his chin and breast and greatly injuring him; and the plaintiff further says that the force of the engine striking the aforesaid cars caused them to move down the track, when they ran into another car of the defendant and caused the plaintiff to fall with great violence against a chair and table, striking his right side and right shoulder, and greatly injuring him, all of which caused the plaintiff great pain, sickness and suffering, from which the plaintiff was compelled to be in bed for a long time, and the plaintiff says that his right side, right shoulder and arm were seriously and permanently injured, and that he has been incapacitated from performing his avocation or doing anything to earn himself and those depending upon him a living and that he still suffers greatly from pain from his injuries.

And the plaintiff alleges that this count of this action is brought under and by virtue of an Act of Congress approved 22nd, 1908, entitled "An Act relating to the liability of common carriers by rail-

roads to their employees in certain cases", as amended by an act of Congress approved April 5, 1910, entitled "An Act to amend an act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases", approved April 22, 1908".

Second. And for that the defendant is and was on the twenty-third day of December, 1915, a common carrier by railroad of passengers and freight, and had and has a line of railroad extending from Clayton, Delaware, to Oxford, Maryland, (through Caroline
5 County and State of Maryland, in which the defendant has agents selling tickets), and by the way of the town of Easton, Maryland; that on the aforesaid twenty-third day of December, 1915, the plaintiff was employed by the defendant as a cook for its employees; that on the aforesaid twenty-third day of December, 1915, a car of the defendant, assigned by the defendant to the plaintiff as the car in which to cook and prepare the meals of its said employees, was located on a side track at the town of Easton, Maryland, coupled at each end to a car of the defendant, and that certain agents and employees of the defendant negligently and carelessly ran an engine with great force into said cars, throwing the plaintiff, who was exercising at all times due care, some ten feet against a door casing and partition, striking his chin and breast and greatly injuring him; and the plaintiff further says that the force of the engine striking the aforesaid cars caused them to move down the track, when they ran into another car of the defendant and caused the plaintiff to fall with great violence against a chair and table, striking his right side and right shoulder and greatly injuring him, all of which caused the plaintiff great pain, sickness and suffering, from which the plaintiff was compelled to be in bed for a long time and the plaintiff says that his right side, right shoulder and arm were seriously and permanently injured and that he has been incapacitated from performing his avocation or doing anything to earn himself a living and that he still suffers greatly from pain from his injuries.

Third, and for that the defendant is and was on the fifth day of March, 1907 a common carrier by railroad, and as such common carrier by railroad, owned, maintained and operated on the said date a line of railroad from Philadelphia, Pennsylvania, to Cape Charles, Virginia, by way of Greenwood, Delaware, (the defendant having agents selling tickets in Caroline County, Maryland); that the plaintiff was employed by the defendant as cook for certain of the defendant's employees, and that a certain car was assigned by the said defendant to the plaintiff in which to cook and sleep, and that about two o'clock, A. M., on the said date, while the said car was on
6 the side track of said town of Greenwood, the agents and employees of the defendant negligently and carelessly ran a car loaded with fertilizer into the said car in which the plaintiff was asleep, with great force, so that the back of the plaintiff's head was thrown against the head-board of the bunk in which he was sleeping and greatly injured him in the head and neck, and the plaintiff says that he then and there suffered great pain and suffering, and that he still suffers from said injury.

Fourth. And for that the defendant is and was on the fifth day of March, 1907, a common carrier by railroad, and as such common carrier by railroad, owned, maintained and operated on the said date a line of railroad from Philadelphia, Pennsylvania, to Cape Charles, Virginia, by way of Greenwood, Delaware, (the defendant having agents selling tickets in Caroline County, Maryland); that the plaintiff was employed by the defendant as cook for certain of the defendant's employees and that a certain car was assigned by the said defendant to the plaintiff in which to cook and sleep, and that about 12:30 o'clock, P. M., on the said date, while the said car was on the side track at said town of Greenwood, the agents and employees of the defendant negligently and carelessly ran a car into the said car in which the plaintiff was working in the usual course of his employment, with great force, and throwing the plaintiff about fourteen feet, injuring his left wrist and elbow, from which he suffered great pain and was totally disabled until April 27th, 1907, and the plaintiff says that the said left wrist and elbow were permanently injured so that he still suffers in the said wrist and elbow from the effects of the said injury.

Fifth. And for that the defendant is and heretofore was a common carrier by railroad, and as such common carrier by railroad, owned, maintained and operated a line of railroad from Philadelphia, Pennsylvania, to Cape Charles, Virginia, by way of Wilmington, Delaware (the defendant having agents selling tickets in Caroline County, Maryland); that the plaintiff was employed by the defendant as cook for certain of the defendant's employees and that a certain car was assigned by the said defendant to the plaintiff in which to cook and sleep and that in the month of November, 1897, at night while the said car was on the side track of said city of
7 Wilmington, the agents and employees of the defendant negligently and carelessly ran a car into the said car in which the plaintiff was asleep, with great force, throwing him out of his bunk, spraining his left shoulder, elbow and wrist, and greatly injuring him, from which injuries he still suffers.

Sixth. And for that the defendant is and heretofore was a common carrier by railroad, and as such common carrier by railroad, owned, maintained and operated on the said date a line of railroad from Philadelphia, Pennsylvania, to Cape Charles, Virginia, by way of Easton, Maryland, (the defendants having agents selling tickets in Caroline County, Maryland); that the plaintiff was employed by the defendant as cook for certain of the defendant's employees, and that a certain car was assigned by the said defendant to the plaintiff in which to cook and sleep, and that while the said car was on the side track at said town of Easton, the agents and employees of the defendant, in October, 1895, negligently and carelessly ran a car into the said car in which the plaintiff was working in the usual course of his employment, with great force causing a swinging shelf weighing about two hundred pounds to fall upon the plaintiff's head, causing him great pain and suffering, totally disabling him from work for a week and partially disabling him from work for a year, from which injuries he still suffers.

Seventh. And for that the defendant is and heretofore was a common carrier by railroad, and as such common carrier by railroad, owned, maintained and operated a line of railroad from Philadelphia, Pennsylvania, to Cape Charles, Virginia, by way of Seaford, Delaware (the defendant having agents selling tickets in Caroline County, Maryland); that the plaintiff was employed by the defendant as cook for certain of the defendant's employees and that a certain car was assigned by the said defendant to the plaintiff in which to cook and sleep and that while the said car was on the side track in the town of Seaford, in April 1907, the agents and employees of the defendant negligently and carelessly ran a car into the said car in which the plaintiff was working in
8 the usual course of his employment, with great force, knocking the plaintiff into a washstand greatly bruising him and seriously spraining his right knee, causing the plaintiff great pain and suffering, from which injuries he suffered and still suffers.

Eighth. And for that the defendant is and heretofore was a common carrier by railroads, and as such common carrier by railroad, owned, maintained and operated a line of railroad from Philadelphia, Pennsylvania, to Cape Charles, Virginia, by way of Blackbird, Delaware, (the defendant having agents selling tickets in Caroline County, Maryland); that the plaintiff was employed by the defendant as cook for certain of the defendant's employees and that a certain car was assigned by the said defendant to the plaintiff in which to cook and sleep, and that while the said car was on the side track at said town of Blackbird, in December, 1903, the agents and employees of the defendant negligently and carelessly ran a car into the said car in which the plaintiff was resting (being the place assigned to him for that purpose) with great force, knocking him out of a chair, another chair on which a heavy man was sitting falling on his left ankle, spraining it seriously, causing him great pain and suffering, from which he suffered and still suffers.

And the plaintiff claims fifteen thousand dollars ($15,000.00).

T. ALAN GOLDSBOROUGH,
Attorney for Plaintiff.

Pleas.

(Refiled April 9, 1917.)

In the Circuit Court for Caroline County.

No. 33 Trials, October Term, 1916.

ALFRED H. SMITH

vs.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY.

The defendant, by Henry R. Lewis its attorney for pleas to 3, 4, 5, 6, 7, 8, counts of the declaration against it in the above entitled cause filed says:

9 For first plea to the said third, fourth, fifth, sixth, seventh, counts, and each of them, the defendant says,

That before this action it satisfied and discharged the plaintiff's claim by payment.

And for second plea to the said third, fourth, fifth, sixth, seventh, counts, and each of them, the defendant says,

That the alleged cause of action did not accrue within three years before this suit.

And for third plea to the said third, fourth, fifth, sixth, seventh, counts the defendant says,

It did not commit the wrong alleged.

HENRY R. LEWIS,
Attorney for Defendant.

Demurrer.

(Refiled April 9th, 1917.)

In the Circuit Court for Caroline County.

No. 33 Trials, October Term, 1916.

ALFRED H. SMITH

vs.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY.

The defendant demurrs to counts one, two and 8th of the declaration against it in the above entitled cause filed and says,

First, the same are bad in substance.

Second, the same are not sufficient in law.

HENRY R. LEWIS,
Attorney for Defendant.

Docket Entries.

1917, April 9th, Issues on demurrer joined short. Demurrer overruled. Exceptions noted.

10 *Additional Pleas.*

(Filed April 9th, 1917.)

In the Circuit Court for Caroline County.

No. 11 Trials, April Term, 1917.

ALFRED H. SMITH

vs.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY.

The defendant, by Henry R. Lewis, its attorney, for pleas to the first, second and eight- counts in the declaration against it in the above entitled case, says:

For first plea the defendant says, it did not commit the wrong alleged.

HENRY R. LEWIS,
Attorney for Defendant.

Docket Entries.

1917, April 10th, Motion by plaintiff for leave to strike out all counts in the declaration except 1st count, Mo. granted.
1917, April 10th, Verdict for plaintiff for $4000.00.
1917, April 10th, Judgment on verdict nisi.
1917, April 16th, Judgment on verdict absolute.

Defendant's Order for Appeal to Court of Appeals.

(Filed June 8th, 1917.)

In the Circuit Court for Caroline County.

No. — Trials, April Term, 1917.

ALFRED H. SMITH

vs.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY.

Lawrence B. Towers, Clerk.

SIR: Enter an appeal from the judgment in the above case to the Court of Appeals.

Affidavit attached.

HENRY R. LEWIS,
Attorney for Plaintiff.

11 *Docket Entries.*

The appeal Bond was filed and security approved on June 8th, 1917.

Petition and Extension of Time for Filing Bills of Exception.

(Filed June 25th, 1917, Before the Adjournment of the April Term.)

In the Circuit Court for Caroline County.

ALFRED H. SMITH

vs.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY.

To the Honorable the Judges of said Court:

Tho petition of the Philadelphia and Baltimore Railroad Company the defendants in the above entitled cause respectfully shows:—

That it has filed its order for an appeal with its affidavit and bond.

That it has been unable to the present time to obtain a copy of the testimony in its said case and is therefore unable to file its exceptions in said case.

Therefore, your petitioner prays your Honors to pass an order extending the time in which to file said exceptions.

And as in duty bound &c.,

HENRY R. LEWIS,
Attorney for Defendant.

Order of Court.

(Filed June 25th, 1917.)

Ordered this 25th day of June, 1917, by the Circuit Court for Caroline County that the time during which the exceptions may be filed in the above case be and same is hereby extended until the first day of August, 1917.

WM. H. ADKINS.

Defendant's Bill of Exceptions.

(Filed Sept. 6th, 1917.)

In the Circuit Court for Caroline County.

No. 11 Trials, April Term, 1917.

ALFRED H. SMITH

vs.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY.

First Bill of Exception.

The defendant filed a demurrer to 1st, 2nd & 8th counts of the plaintiff's declaration which said demurrer was overruled by the Court to which ruling of the Court the defendant excepted and prays the Court to sign and seal this his first bill of Exceptions which is accordingly done this — day of September 1917.

W. H. ADKINS, [SEAL.]
PHILEMON B. HOPPER, [SEAL.]

At the trial of this cause the plaintiff to maintain the issues on his part joined offered the following testimony:

ALFRED H. SMITH, the plaintiff in this cause, produced on his own behalf, after having been duly sworn, gave the following answers to interrogatories to him propounded:

15 Examined in Chief by Mr. Goldsborough:

Q. Now Mr. Smith, will you state your full name please sir?
A. Alfred H. Smith.
Q. And your home, Mr. Smith?
A. Queen Anne.
Q. How long have you lived there?
A. I have been living there fourteen years.
Q. Where did you live before that?
A. Talbot County.
Q. Now Mr. Smith, on and prior to the 23rd of December 1915 what was your employment?
A. My employment was to do the cooking. I think we had eleven men at that time. I was to do the cooking, clean the car, make the beds and do anything my boss asked me to do.
Q. When you say your boss—at that time who was your boss?
A. G. A. Larrimore.
Q. What kind of a car was this?
A. It had been a day car, fixed up as a camp car.
Q. Where did that car go to, and the men with it?

A. Anywhere the Company sent it. We went as far as the West Yard, Delmar, Principio and we were on the Virginia side.
Q. What Company was this you were working for?
A. The Pennsylvania Company.
Q. What is the name of it?
A. The P. W. & B.
Q. What does that mean?
A. The Phila., Balto. & Washington.
Q. Does that mean the Phila., Balto. & Washington? You said P. W. & B.
A. Yes, I guess so. My boss can tell you.
Q. What are these papers that I'm handing you? (Papers are here handed witness.)
A. These are my passes.
Q. Where does the road go, Mr. Smith, that you worked for? From what point to what point, and what branches has it? Where does the main road go?
A. It goes from Wilmington to Delmar. I don't know whether it goes to Salisbury now or not.
16 Q. I'm not asking you where you worked, I'm asking you what road you worked for?
A. I used to go on the D. M. & V.

Court:

Q. Mr. Smith, do you mean the Phila. Balto. & Washington? You said the Pennsylvania. Do you mean the Phila., Balto. & Washington R. R.?
A. The Pennsylvania.
Q. That isn't the name, it's the Phila., Balto. & Washington; is that what you mean?
A. That's what I mean. It was always called the Pennsylvania.
Q. Always called the Pennsylvania system?
A. Yes, sir.

Mr. Goldsborough:

Q. Now Mr. Smith, you say that this car went everywhere where work was needed?
A. Yes, sir; where-ever our boss ordered we had to go; the car and men both had to go.
Q. You went too?
A. Yes, sir.
Q. What were the men who occupied the car with you engaged in?
A. They had to do any kind of work. They were supposed to be bridge carpenters.
Q. What were they doing below Easton at the time the accident occurred and before that time?
A. They were making a cement abutment on the iron bridge when I got hurt.
Q. What ran over it?
A. Freight trains and passenger trains.

Q. From what point to what point?
A. From Clayton to Oxford.
Q. That is the work they were doing?
A. Yes, sir.
Q. The name of the men was bridge carpenters?
A. Yes, sir.
Q. How long had you been working for the Company?
A. Twenty-three years, six months and six days when I got hurt.

17 Q. They worked where?
A. Wherever they were sent, Delaware, Virginia, Maryland.

Q. If they were working at Principio, as you said, they were on the Maryland Division?
A. Yes.
Q. Is that a bridge they were working on?
A. Yes, sir.
Q. Where did these trains run from and to over that bridge?
A. I hardly know, it runs from Balto. to Wilmington I think, my boss can tell you.
Q. Was this car and this gang of men ever in Delaware working?
A. Yes, sir.
Q. How long before this accident?
A. I don't know, somewhere about January I think.
Q. Somewhere about January preceding the accident?
A. Yes, sir.
Q. Where were you then?
A. Christiana.
Q. That is near Wilmington?
A. Yes, sir.
Q. Now Mr. Smith, what were you doing on the 23rd day of December 1913?
A. I was getting dinner. I was cooking a big turkey, and a freight came along between eight and nine o'clock. They always gave me warning before when they were coming in on that track. I had been to the stove to baste the turkey. I had two kettles of boiling water for the potatoes. I just started after them when they struck me. I was knocked about ten feet and bruised my chin.

(The witness here made a further statement which was stricken out by the Court.)

The Witness continuing further states: When they struck the other two cars before I could recover they knocked me over a chair and my shoulder struck here (Indicating). I had no use of my shoulder since. If I have to "bust" any wood I have to put the axe here. (Indicating) I can't cut wood. My whole dependence is on the R. R. Co., with a sister and niece.

Mr. Lewis: "That's all voluntary."

18. The Witness continuing further states: The first man in the car was the engineer; he wanted to know what he could

do for me. I told him he couldn't do anything on the train. The engineer and conductor, the fireman was there the last one. When he went out he said "he's hurt worse than you think, send for a doctor." The Co's doctor came and he examined me down here (Indicating). I was bruised on my breast and chin. Mr. Townsend was in the car several times. He was in the car when it stopped for me to go home. The Dr. advised me to go to the hospital. I said no I better go home.

Q. How did you go home?

A. Mr. Billy Stevens took me up in an automobile from Queen Anne's Station. The train stopped for me and I went up in an automobile. I was all sore. This was between eight and nine o'clock in the morning and I never got home till about three.

Q. How did you get home?

A. Bill Stevens got me.

Q. He went to the train at Queen Anne?

A. Yes, sir.

Q. He met the train there?

A. Yes sir. I got in the automobile the best I could and went home.

Q. Now that was on the afternoon of the 23rd?

A. Yes.

Q. When you got home what did you do?

A. Lay down and sent for a doctor.

Q. Did he examine you?

A. Yes, sir.

Q. Who was the Dr.?

A. Dr. Rowe.

Q. Dr. Rowe?

A. Yes, sir.

Q. How were you affected then?

A. Oh, I was awful sore and had awful pain. I spit blood for three days. The Dr. strapped me. I suffer in this side and I suffer in this shoulder. (Indicating).

Q. Now Mr. Smith, state to the gentlemen of the jury what, if any, labor you are able to do in your present condition.

A. Well, I'm not able to do anything. I'm able to hoe
19 I'm able to hoe with this hand. (Indicating). I have been trying to get a job of light work, but they say they don't want a man with one hand. What are you going to do? If it had not been for my friends this winter I guess I would froze to death. My friends have been right good to me.

(Objected to.)

Q. Mr. Smith, how long had this car been on the siding at Easton when it was struck?

A. I think about three weeks if I'm not mistaken.

Q. State whether or not that freight train had been passing there daily?

A. Yes, sir; twice a day, once up and once down.

Q. The engineer whose engine struck your car, state whether or not he knew that car was on the siding?
A. I suppose he did, he hauled it out once or twice and took a car.
Q. And then put it back?
A. Yes, sometimes he would put a car back out of the car house.
Q. Was it where he could see it the day of the accident?
A. Yes, sir.
Q. Was there anything between him and the car?
A. No, sir.
Q. So he couldn't see it?
A. No, sir, he could see it.
Q. Tell the gentlemen of the jury about these cars. How many cars were there in the group that were struck?
A. Three. This end there was a cabin car.
Q. The cabin car was on the north side?
A. Yes, sir. I was in the center. There were two more cars further on.
Q. Who was in the car away from you?
A. E. P. Carroll.
Q. How far was this end of the car—the cabin car from the switch?
A. Somewhere near 200 feet.
Q. Now how far was it from the clearance of the switch?
A. 154 feet. Not only that they struck the stove and busted the partition.
20 Q. Did you see the car that was struck after it was struck?
A. Certainly, after I got out to get on the train and going by. The platform was mashed and I don't know what you call it, the timber was mashed and a bar twisted.
Q. Now Mr. Smith, when the engine struck this car did it move at all?
A. Certainly it moved, it struck the two other cars.
Q. They were the cars Mr. Carroll was in?
A. Yes, sir; it knocked him ——

Mr. Goldsborough: "You can't testify what it did to him unless you saw it."

Q. Did it do his car any damages?
A. I don't know whether it done his car any damage; it knocked his dinner all over the floor and he had to go up and get more grub.
Q. Now Mr. Smith, state whether or not the Company has paid you any money since the accident?
A. They haven't paid me "arey" cent.
Q. They haven't?
A. No, sir.

(The witness here testified to injuries sustained and previous accidents while in the employ of the Company, all of which was stricken out by the Court at the close of the plaintiff's case.)

Q. Mr. Smith, who was in charge of the freight train at Easton on the day of the accident?

A. Mr. Harry Eastman.
Q. Did you hear him say anything about the cause of the accident?

(Objected to.)

Q. When did you hear him make any remark, if at all?
A. I heard him make the remark ——
Q. After the accident?
A. Yes, sir.

(Objected to). (Objection sustained.)

21 Q. Who put the car which you were assigned to eat and sleep in there? Was it the agent of the Company that put the car there?
A. Well, it was the agent.
Q. Was it the conductor or the engineer that ran the car in there?
A. It was a train-man, a freight train-man that ran the car in there; the same crew that hurt me.

Cross-examination by Mr. Lewis:

Q. Mr. Smith, how old are you?
A. I'll be seventy years old the 6th of next August.
Q. You were born in Delaware?
A. I was born in Delaware.

Mr. Goldsborough: "All the good people were born there, were they not Mr. Lewis?"
Mr. Lewis: "Most of them."

Q. You have been working for the R. R. Co. twenty-three years?
A. Twenty-three years, six months and six days.

(Counsel here cross examined witness on the testimony brought out in chief as to injuries sustained on previous accidents while in the employ of the Company, which examination was stricken out at the close of the plaintiff's case, as was the examination in chief.)

Q. Since you have been in the employ of the R. R. Co. you haven't been able to do hard laborious work?
A. Yes, sir; that is a fact.
Q. Yet you received from the R. R. Co. $50.00 a month?
A. I had been getting that two months; before that I was getting only $45.00 to support myself and a sister and niece.

Mr. Lewis: "Suppose you had a house full of young ones, the R. R. Co. isn't responsible for that."

Q. Is there any other job that you could go at and make $50.00 a month, a man seventy years old and crippled up?
A. The Company crippled me.
22 Q. What is the smallest wages you get.
A. I first worked for $1.25 a day and paid my own way.

Q. When you were getting $1.25 and paying your board out of that what were men getting who worked on a farm?
A. About seventy-five cents a day.
Q. And boarding themselves?
A. I don't know about that.
Q. All the time you have been working for the Co. as cook isn't it a fact, even up to the time of the last accident, that the men furnished the grub for you?
A. I had to furnish all the grub.
Q. Who gave you the money?
A. We all chipped in. We kept an account of every meal and at the end of every pay day they counted the meals; they counted what money they spent for grub.
Q. All this time you were cooking the men's grub they paid for it?
A. Yes, I cooked the Co.'s grub too.
Q. You have?
A. Yes, the Co. bought and furnished grub. I cooked for over a hundred one time at Laurel.

Mr. Lewis: "Mr. Smith, the Company, as far as I know, are not making any complaint about the services you rendered. You have never complained against the Co. either until this time have you?
Witness: "No, sir."

Q. You have spoken about hurting your right arm at Easton and your shoulder at Wilmington?
A. Yes, sir.
Q. You also testified that it pained you now?
A. Yes, sir; my shoulder and side.

Mr. Lewis: "I'm not talking about the last accident." (All testimony as to previous accidents was stricken out.)

Q. You told how many feet that car was down that track at the time and just immediately before the accident happened, on that siding?
A. Yes, sir.
Q. Will you repeat it?
A. From the clearance of the switch to the car there was 154 feet.
23 Q. From the clearance of the switch to your car was 154 feet?
A. No, the car that was torn up, I was in the middle car. Here was the one they struck; here is where I was hurt; here was a tool car. (Illustrating).
Q. The car that was struck, what was it used for?
A. For men to sleep in; they were fixing it up, but they had been sleeping in it some time.
Q. And not sleeping in the car where you were cooking?
A. No, sir.
Q. How was that car constructed inside, the one you were cooking in?

A. It had a partition across it. There were twelve bunks. The partition stood across here (Indicating) This was the bed room; in this corner was an ice cupboard; over in this side was a clothes press where the men kept their best clothes; back near the stove it had another clothes press to keep dirty clothes in.

Q. How long was the cooling car?

A. Somewhere about thirty feet.

Q. The stove stood in one end of the cooking room?

A. Yes, in one end of the car.

Q. And the cupboard on the other side from the stove?

A. Yes. We had lockers on each side like they have on boats to keep our provisions we get in.

Q. What was it you went against?

A. I went against the clothes press door. They were fixing it making something else.

Q. Was that clothes press against the partition?

A. Yes, sir.

Q. Did the clothes press open on the cook side?

A. Yes, sir; there is where I had the sweet potatoes. I just started after them when they struck me. If I had been around the stove I would be scalded to death in the clothes press.

Q. That's a matter of opinion. You might not be hurt at all.

A. I would be. I certainly would be killed there.

24 Q. I understood you to say you were cooking a turkey?

A. Yes, sir; I was giving them a turkey dinner.

Q. Whose turkey was that?

A. Ours.

Q. Who is "ours"?

A. All the bridge carpenters and mine together.

Q. It didn't belong to the R. R. Co.?

A. No, sir.

Q. I understood you to say that at the time you met with this accident you were receiving sixteen and two-thirds cents an hour—fifteen and four-tenths cents an hour. You were working how many hours a day?

A. Thirteen hours for pretty near two months.

Q. Do you carry any life insurance?

A. No, sir. You know I used to carry life insurance in the Heptasophs but it got so high I couldn't pay the dues.

HARRY GOFF, a witness of lawful age, produced on behalf of the plaintiff, after having been duly sworn, gave the following answers to interrogatories to him propounded:

Examined in Chief by Mr. Goldsborough:

Q. State your full name?

A. Thomas Henry Goff.

Q. And your residence?

A. Henderson, Maryland.

Q. Mr. Goff, by whom are you employed?

A. The Phila., Balto. & Washington R. R. Co.
Q. How long have you been employed by that railroad?
A. About nine years, something like that.
Q. In what capacity are you employed?
A. As a carpenter.
Q. Are you called a bridge carpenter?
A. Yes, sir.
Q. Now Mr. Goff, will you state your duties if you please? What are they and where do you go to perform them?
A. Why we go from Wilmington to Delmar and the branch roads on the Delaware Division.
Q. In how many states do you work in performing your duty?
A. Two, Delaware and Maryland.
Q. What is your work as a bridge carpenter, do you repair bridges?
A. Yes, sir.
Q. What kind of trains run over those bridges that you repair? Do they pass through one state or more than one state?
A. Some of them go through two states, like on the Oxford branch.
Q. Do you work on bridges over which trains pass that don't pass through more than one state?
A. I don't know as I do.
Q. You work on all the branches. Do you work on the branch from Townsend in Delaware to Chestertown and Centerville in Maryland?
A. Yes, sir.
Q. The different places you have worked on are from about the Christiana Bridge to Delmar on the main line of the Delaware Division and on all the branches?

A. Yes, sir.

Mr. Lewis:

Q. From the Christiana Bridge to Delmar is all *all* in Delaware isn't it?
A. Yes, sir; I think it is.

Mr. Goldsborough:

Q. Now Mr. Goff, how do you travel from one of these places to another?
A. Most of the time we go on a passenger train; some times we go on a freight.
Q. When you are at a job where do you sleep and eat?
A. In a camp car.
Q. Do they move the camp car from one place to another?
A. Yes, sir.
Q. And from one state to another?
A. Yes, sir.
Q. In the last nine years who has been the one employed by the R. R. Co. to take care of the camp car?

A. Mr. Smith has been a good bit of that time.
Q. The plaintiff in this case?
A. Yes, sir.
Q. Now Mr. Goff, was that camp car at Easton on 23rd of December 1915?
A. Yes, sir.
26 Q. Mr. Goff, how many bridge carpenters were in that gang?
A. I think somewhere around seven or eight; about eight.
Q. Did that include Mr. Smith?
A. He was extra, him and Mr. Larrimore—nine or ten.
Q. What position had Mr. Larrimore?
A. He was boss on the job.
Q. Is he Mr. Smith's boss as well as yours?
A. Yes, sir.
Q. What was that gang doing at Easton at that time?
A. Putting in a concrete abutment for an iron span to be put on—a railroad bridge.
Q. What kind of trains run over that bridge?
A. Passenger trains and freight trains both.
Q. Where do they run from and to?
A. From Oxford to Clayton.
Q. From Clayton, Delaware to Oxford, Maryland?
A. Yes, sir.
Q. How far is it from Clayton to Oxford?
A. Fifty-four miles is what they have on my pass.
Q. How far is the Maryland-Delaware line below Clayton?
A. I don't know exactly, about fifteen miles.
Q. About fifteen miles of that road is in Delaware and the balance is in Maryland?
A. Yes, sir.
Q. Mr. Goff, what time of the day was it on the 23rd of December 1915, after you went to work, that you saw Mr. Smith?
A. I didn't see him until somewhere near twelve o'clock.
Q. Where was he then?
A. He was in the car.
Q. Will you state to the gentlemen of the jury what his condition was?
A. He seemed to be in pretty bad shape. He said he was hurt in his side and shoulder. He didn't seem to have much use of his shoulder.
Q. State to the jury whether ordinarily he was a shirker or anything of that kind, or whether he laid down on the job?
A. No, I don't think he ever did. He was most always in a hurry.
27 Q. He seemed to be in pretty bad shape?
A. Yes, sir.
Q. How long were you up to the car?
A. I judge a half hour or a little longer.
Q. Before you went back to your work?
A. Yes, sir.

Q. Do you remember what damage was done to this car by the accident? The condition of the car?

A. As well as I remember about the car it was a passenger coach we were fixing for a camp car, and the steps on one side were ripped up and the platform was broken and this draw bar was pushed in.

Cross-examination by Mr. Lewis:

Q. You don't know when, where or how that occurred?
A. No, sir; only what I was told.
Q. That you don't know?
A. No, only what I seen.
Q. Mr. Smith was cook?
A. Yes, sir.
Q. For you men?
A. Yes, sir.
Q. Who provided something for him to cook? Who paid for it? Whose was it?
A. All of us paid our board.
Q. The R. R. Co. didn't find the food?
A. Not what we were eating then.
Q. They didn't do so usually?
A. No, sir.

Redirect examination by Mr. Goldsborough:

Q. Mr. Goff, when you said you paid for it and boarded yourself—Mr. Smith boarded himself?
A. Yes, sir.
Q. You were all there under the same conditions and terms?
A. Yes, sir.

HARRY V. EASTMAN, a witness of lawful age, produced on behalf of the plaintiff, after having been duly sworn, gave the following answers to interrogatories to him propounded:

Examined in Chief by Mr. Goldsborough:

Q. Mr. Eastman, state your full name.
A. Harry Eastman.
Q. Who were you employed by on the 23rd of December 1915?
A. The P. B. & W. R. R. Co.
Q. How long had you been employed by that Company?
A. Ever since the P. B. & W. has been in existence. When I first went railroading in 1873 it was known by the P. W. & B.
Q. You have been in its employ, and the company preceding it, since 1873?
A. Yes, sir; the first day of July.
Q. Are you still in the employ of the R. R. Co.?
A. No, sir; I'm on the retired list.
Q. In what capacity were you employed on the 23rd of December 1915?
A. Conducting a freight train.

Q. How long had you been freight train conducting?
A. Ever since '79.
Q. What was the run of the freight train you were on at the time of the accident?
A. From Oxford, Maryland to Clayton, Delaware.
Q. And return.
A. They returned the next day.
Q. Who was your brakeman?
A. Milton Jones. He was what we call middle brakeman, and a fellow named Jas. M. Downes.
Q. Mr. Jones was brakeman?
A. Yes, middle man.
Q. Who was your engineer?
A. Luther Mills.
Q. The engine you were using that day, what was that engine's run? Between what points?
A. From Oxford, Md. to Clayton, Del.
Q. How long had it been on that run?
A. I couldn't answer that question. We have different engines. We don't have any regular engine at all.
29 Q. Had that engine been used before on the branch road?
A. Oh, yes, she had been in the service right along to the best of my judgment.
Q. The engineer, Mr. Mills, what was his run?
A. He was running for me on this day in question, but it wasn't his run. I think our regular engineer was sick. He was extra engineer on that train.
Q. Between Clayton and Oxford and return?
A. Yes, sir.
Q. How long had he been on that run?
A. About two weeks.
Q. State whether or not there was a camp car on the side track at Easton at that time?
A. Yes, sir.
Q. State how long it had been there?
A. About three weeks.
Q. Mr. Eastman, will you state to the gentlemen of the jury what the engine was doing, what work it was engaged in, immediately preceding the accident.
A. We had gone down to the Easton Wholesale Grocery; then we had to leave room on the main track. We cut the engine loose to couple up on this car. You can call it a running switch or dropping a car; we made what we term a ground switch, and let the engine up on the camp car.
Q. The car runs out on the main track?
A. Yes, sir.
Q. On this day was the car going with sufficient rapidity to go into the freight cars that had been left on the main track?
A. No, sir; it didn't.
Q. You had to couple up after?
A. We had to put a drag rope on it after.

Q. State whether or not the cars had been so placed on the main track by you that if the freight car had been run on the main track with ordinary speed it would go up to the cars?

A. Oh, yes, we went in to give this car a start to get it out.

Q. Now, Mr. Eastman, at whose orders did the engineer make this run for the freight car?

A. We get a message from the agent at Easton what cars he
30 has to go out. This time we received a message from the agent. We always catalogue our work out. Mr. Jones, my middle brakeman, told me had told Mr. Mills what our work was and how I wanted it done.

Q. State whether or not, Mr. Eastman, you had made that run before without going into the camp car?

A. Yes, sir. Tuesday morning before—the accident was Thursday—Tuesday morning before we made a drop of three cars. The fireman at this time was handling the engine.

Q. Which time?

A. At the time we dropped the three cars.

Q. This engineer was a relief engineer; a supply engineer?

A. Yes, sir; an extra engineer.

Q. Do you mean he was green?

A. Oh, no, I don't mean to say he was green. He's like the rest; he has to pass an examination for his work.

Q. Now Mr. Eastman, state to the gentlemen of the jury whether or not there was plenty room for that engine to make its run for the freight car, come out on the main track and then go back on the side track without striking those cars?

A. That was my judgment, there was plenty room. We had been doing this work right along. There was about five car length room, about 170 feet or more.

Q. How long had that siding been there?

A. I couldn't just say how long it has been there. There had been several repairs to it.

Q. How long have you been making these car drops with the Easton Wholesale Grocery Co.?

A. Ever since we had a side track there.

Q. How long has that been?

A. Two or three years.

Q. Mr. Eastman, who was in charge of the engine that day?

A. The engineer.

Q. State whether or not that particular engine continued on the run up to Clayton that day?

A. Yes, sir; it surely did.

31 Q. Was there anything wrong with the engine?

A. Nothing wrong reported to me or anybody else.

Q. State whether or not it would be the duty of the engineer to report if anything was wrong with the engine?

A. Sure, they report it in.

Q. Was any such report made to you that the engine didn't work properly?

A. No, sir.

Q. Was any report made to you about breaking anything on the engine?

A. None at all.

Q. Did the engine work all right the balance of the trip?

A. As far as I know.

Q. The next day did you use the same engine?

A. I don't recollect whether we had the same engine or not. My car report will show it.

Q. State what, if anything, there was to interfere with the engineer's seeing these cars on the side track—the camp car?

A. There was nothing to hinder anybody from seeing.

Q. As I understand he had been passing and re-passing those cars for about two weeks daily?

A. Well, he had been on that run, I think, that day about two weeks.

Q. That car that you ran out on the main track from the Easton Wholesale Grocery, what do you call that?

A. We call it a Delaware Road car. We put off freight all along the stations, and pick up freight.

Q. Was Thursday a big day for that car?

A. Well, no, not such a very heavy car.

Q. How far up does it run?

A. We generally take it to Clayton. Generally the freight goes to Clayton.

Cross-examination by Mr. Lewis:

Q. I understood you to say you had freight on that train that you put off all along the stations?

A. Yes, sir.

Q. Along till you got to Clayton?

A. Yes, sir.

Q. If you had any other freight to take on you would load it on that too?

A. Yes, sir.

32 Q. On this particular day do you remember whether you had mixed freight, some to drop along at the various stations?

A. Yes, sir; I feel positive of it, although I couldn't say. I have no way of telling unless I had my train book. I can't tell otherwise.

Q. You said sometimes you drop it along the route?

A. Yes, sir.

Q. You don't know on this particular day whether you had dropped it off or not?

A. I don't know.

Q. Your trains do carry freight from one point to another in the State of Maryland and also outside the State of Maryland?

A. Yes, sir; we have freight all the way from Clayton to Oxford and from Oxford to Clayton, taking on and putting out both.

Mr. Lewis: "I think that's all."

Court here adjourned at 6:40 P. M. until tomorrow, April 10th, at 9:30 A. M.

Court reconvened at 9:30 A. M. April 10th, pursuant to adjournment, with Judge Adkins and Hopper on the Bench.

WM. POTTER, a witness of lawful age, produced on behalf of the plaintiff, after having been duly sworn, gave the following answers to interrogatories to him propounded:

Examined in Chief by Mr. Goldsborough:

Q. Now Mr. Potter, where do you live?
A. Harrington.
Q. What is your employment?
A. A bridge carpenter.
Q. By whom are you employed?
A. The Phila., Balto. & Washington R. R. Co.
Q. The Phila., Balto. & Washington R. R. Co?
A. Yes, sir.
33 Q. How long have you been employed by that Company as a bridge carpenter?
A. Well, about twelve years as a carpenter.
Q. Where were you, Mr. Potter, on the 23rd of December 1915?
A. About a mile or a mile and a quarter south of Easton.
Q. That is where your work was?
A. Yes, sir.
Q. Where was the car in which you were living?
A. Lying in Easton on a siding.
Q. As I understand it, you were one of the gang of bridge carpenters who occupied that car?
A. I was.
Q. On the 23rd day of December after you left in the morning when was the next time you saw the plaintiff, Mr. Smith?
A. Somewhere about nine o'clock.
Q. You saw him about that time?
A. Yes, sir.
Q. Where was he?
A. In the car.
Q. How did you happen to be up there?
A. The work train was down there that day; they came down and said they ran into the car and hurt the cook badly, so I went up to the car.
Q. Where was Mr. Smith when you got there?
A. Sitting on a chair.
Q. What was his condition?
A. He seemed to be scared pretty badly and hurt I guess, I couldn't tell, I never examined him.
Q. What did he say?
A. He said he was hurt pretty bad.
Q. How long had you known him?
A. Oh, eighteen or nineteen years.
Q. How long did you stay up there?
A. I stayed there the balance of the day.
Q. Did you do anything for him?

A. No, sir; only to make him comfortable.
Q. He went up on the afternoon train?
A. Yes, sir.
Q. Did you see the car that was said to be run into?
A. Yes sir.
34 Q. What was its condition?

(Objected to.) (Question withdrawn).

Q. Mr. Potter, state to the gentlemen of the jury whether or not you looked at the car which was attached to the car occupied by Mr. Smith, on the north side?
A. I did, I went around and examined it.
Q. What was its condition?
A. The end of the platform was badly broken; the draw bar bent in on the truck; the rods broken and bent.
Q. What damage was done in the car he occupied?
A. Things were upset; chairs and water all over the floor and the partition was busted.
Q. Do you know whether the stove was broken?
A. The stove was broken.

Cross-examination by Mr. Lewis:

Q. This car that you examined, what kind of a car was it? What was it originally used for?
A. It was a passenger coach they fitted up for us to use.
Q. A new one?
A. Just an old wooden car.
Q. Just an old wooden car that had been abandoned for regular service?
A. Yes, sir.

Mr. Goldsborough:

Q. I understood you to say the partition was bursted?
A. Yes, sir.

Mr. Lewis:

Q. Had the cracks opened?
A. Yes, sir; busted open. It looked like it had been hit by something.
Q. I believe you said Mr. Smith's business was cooking in the car?
A. Yes, sir.
Q. Cooking for you men?
A. Yes, sir.
Q. Who provided him something to cook?
A. The grub was bought by him and we kept an account of the meals and at the end of the month we divided the meals with
35 the amount of money spent. Each man paid his board.
Q. It was provisions provided by you men?
A. Yes, sir.

Q. The Company didn't furnish the food?
A. No, sir.
Q. You boarded yourselves?
A. Yes, sir.
Q. And Mr. Smith himself?
A. Yes, sir.

(The witness was here interrogated as to the plaintiff going to the Delaware Hospital in 1915, which testimony was stricken out by the Court at the close of the plaintiff's case.)

Q. Have you known of Mr. Smith suffering from vertigo?
A. No, sir.
Q. He hadn't been sick while you were working?
A. Not as I know of only just complain about feeling bad or something like that.
Q. You didn't see the accident at all?
A. No. sir.

Mr. Lewis: "That's all."

Redirect examination by Mr. Goldsborough:

Q. Mr. Lewis asked you if you knew of his being sick. You say you knew him eighteen or nineteen years?
A. Yes, sir.
Q. During what portion of that time have you occupied the same car with him?
A. I guess six years. He stayed with us two or three years, then he went with the painters about six years.

W. T. A. TOWNSEND, a witness of lawful age, produced on behalf of the plaintiff, after having been duly sworn, gave the following answers to interrogatories to him propounded:

36 Examined in Chief by Mr. Goldsborough:

Q. Mr. Townsend, what is your full name?
A. Wm. T. A. Townsend.
Q. And you live at Easton?
A. At Easton, yes sir.
Q. What is your employment?
A. Agent for the Phila. Balto, & Washington R. R. Co.
Q. Freight agent?
A. Both freight and passenger.
Q. Do you remember the accident in this case?
A. Yes, sir; I remember the circumstances.
Q. Did you see the accident?
A. I did not.
Q. Did you see the car that was on the siding on the north of the car occupied by Mr. Smith after the accident?
A. Yes, sir.
Q. State to the gentlemen of the jury what was its condition.

A. The draw bar was torn from its fastening and the platform was splintered some.

Q. Did you notice the inside of the car?

A. Yes, I was in through them all.

Q. What was the condition of the inside of the car occupied by Mr. Smith?

A. Some disarrangement of the furnishings was about all I noticed in that car.

Q. Now Mr. Townsend, state what, if you remember, was the distance from where the siding and the main track cleared to the northern end of the car attached on the north side of the car occupied by Mr. Smith?

A. From the point of clearance to the north car was around 150 feet.

Q. How long have you been railroading?

A. Thirty-two years.

Q. From your experience state whether or not, in your judgment, there was plenty room for an engine to stop in that distance without striking that car?

A. My experience doesn't qualify me in that capacity.

Q. Of course if you are not qualified that's all right.

A. Only from observation. Actual experience I had not had in the handling of trains.

37 Q. Your observation—State your judgment from your observation.

A. Well, under normal conditions, from my observation, there was room.

Q. Mr. Townsend, did you see Mr. Smith after the accident?

A. I did.

Q. What was his condition?

A. He was sitting on a locker and seemed to be frightened and was shivering from the cold. He had no coat on. I asked for his coat and suggested that he put it on. I helped to move him to the other car which was warmer, had a better fire and made him more comfortable.

Q. What did he complain of?

A. He didn't make any specific complaint at all to me; in fact, I didn't ask him much about it. I went there in company with the Co.'s surgeon. I called him myself and went there with him.

Q. That's Dr. Merritt?

A. Yes, sir; Dr. Merritt.

Q. When did Mr. Smith leave there that day?

A. On the afternoon passenger train that left between two and 2:30. I don't recollect the schedule.

Q. The passenger train stopped opposite the car he was occupying?

A. Yes, sir.

Cross-examination by Mr. Lewis:

Q. In locating the car from the point of clearance at the switch were you locating it before the impact or after?

A. Afterward.

Q. You don't know what the distance of the point of clearance was before the impact?

A. Not exactly, only from some splinters from the wreckage that indicated where it stood.

Q. This, I believe was an old discarded passenger car?

A. Yes, sir; one of the weaker type.

Q. About how long, if you know, was it from the time of the accident until you reached the car?

A. About twenty minutes.

Q. That was about what time in the morning?

A. Between eight and 8:30.

38 Q. Did Mr. Smith make any complaint?

A. He made no specific complaint.

Q. Was he complaining of being hurt?

A. Yes, sir.

Q. Did you see evidence of it?

A. I saw no evidence of any actual injury. He seemed to be very much excited and was shivering from the cold.

Q. Did you notice his chin?

A. I did not.

Q. I believe he said that was bruised.

A. —.

Q. Did you see him again after that?

A. Yes, I saw him a number of times between that and the afternoon. I made several trips down to see that he was comfortable.

Q. How did he seem to be as far as scare or nervousness was concerned?

A. Within an hour or two he was more composed. After he got his coat on and got by the fire he got a little quiet. He rested very much easier. He didn't seem to be nervous at all when I saw him the second time.

Q. Did you hear the offer to take him to the hospital?

A. Yes, sir; I suggested it myself.

Q. What response did he make?

A. He declined it and said he wanted to go home.

Q. And did go on the afternoon train?

A. Yes, sir.

Q. The train stopped at an unusual place and took him aboard?

A. Yes, sir; that was my suggestion.

E. P. CARROLL, a witness of lawful age, produced on behalf of the plaintiff, after having been duly sworn, gave the following answers to interrogatories to him propounded:

Examined in Chief by Mr. Goldsborough:

Q. Mr. Carroll, where do you live?

A. Dover, Delaware.

Q. What is your employment Mr. Carroll?

A. Railroading.

39 Q. In the employ of the P. B. & W.?

A. Yes, sir.

Q. How long have you been employed by the R. R. Co.?
A. Five years and four months.
Q. In what capacity?
A. In the cook car, or cabin car.
Q. You occupy the same kind of a position that Mr. Smith occupied?
A. Yes, sir.
Q. In another car?
A. Yes, sir.
Q. Now Mr. Carroll where was your car located on the 23rd of December 1915?
A. Easton, Md. on the siding.
Q. In what relation to the car occupied by Mr. Smith? How did it stand on the track as compared with where Mr. Smith's car stood?
A. Right back of him.
Q. Were you south of him?
A. Yes, sir.
Q. Were you coupled up to his car?
A. No, sir.
Q. How far was your car south of the car occupied by Mr. Smith?
A. About the length of a car.
Q. What were you doing at the time of the accident?
A. Standing at the cabinet—kitchen cabinet.
Q. Did you have any warning of the accident?
A. Yes, sir.
Q. How did you know it?
A. When it hit the other car.
Q. When the engine struck the car occupied by Mr. Smith you heard it?
A. Yes, sir.
Q. What did you do?
A. Grabbed the cabinet.
Q. State whether or not the car occupied by Mr. Smith struck your car?
A. Yes, sir.
Q. With what force? Illustrate it with what damage was done?
A. It knocked the stuff off the stove, the kettle and some things.
Q. You were holding on to the cabinet. I won't ask you what you said.
A. Don't no. They don't want to know that nohow.
Q. Was it a pretty hard bump?
A. Yes, sir.
Q. After the accident did you go in to see Mr. Smith?
A. Yes, sir.
Q. State what his condition was.
A. He was sitting alongside of the stove with his feet in the sand box. He said: "Ned, I'm hurt." I said, You are? He said "yes." He seemed to be cold, chilly, shivering.
Q. Were you the first one there?
A. No, sir.
Q. Who was in there ahead of you?

A. I think the engineer was. The engineer told me he was the first man in there.

Q. Did you have any talk with Mr. Smith about his condition that day?

A. No, sir.

Q. Did you assist him?

A. I asked him if there was anything I could do for him.

Q. He went up on the afternoon train?

A. Yes, sir.

Q. Could you use the dinner that you were cooking?

A. Part of it, yes, sir.

Q. Part of it?

A. Yes, sir.

Cross-examination by Mr. Lewis:

Q. The knock spilled your dinner?

A. Yes, sir.

Q. You had to go to market again?

A. No, sir.

Q. You had to prepare other food?

A. Some of it, yes, sir; some was all right.

Q. When you asked Mr. Smith if there was anything you could do for him do you remember what reply he made?

A. Yes, sir.

Q. What was it?

A. He asked me to baste his turkey for him.

Q. The turkey had not been put in such condition that it was not eatable?

A. No, sir.

Q. Did anybody pick it up off the floor?

A. Not as I know. It was in the oven.

Q. It didn't throw it out of the oven?

A. No, sir.

41 Q. I thought that stove was broke all up the way they have been talking about it?

A. The stove wasn't tore up that bad.

Q. Fire was still in it?

A. Yes, sir.

Q. Did you fix the fire up?

A. No, I didn't touch the fire.

Q. Did you baste the turkey?

A. I did.

Q. Who finished the dinner?

A. Mr. Potter.

Q. How many times did you see Mr. Smith from then on till he left?

A. I couldn't exactly tell you, several times. I was back and forth till he left.

Q. Were you there when the train stopped and took him on?

A. Yes, sir.

Q. Stopped at an unusual place?
A. —.
Q. Was the train in the habit of stopping there?
A. No, sir.
Q. To take on anybody?
A. No, sir. It was ordered to stop there.
Q. Specially to get him?
A. Yes, sir.
Q. After he was put on the train did you see him any more?
A. No, not for some time.
Q. How long a time Mr. Carroll?
A. I couldn't really tell you.
Q. Did you see him again while you were at work at Easton?
A. Yes, sir.
Q. Where did you see him?
A. In Easton.
Q. How long did you remain at Easton after the accident?
A. I don't remember.
Q. Weeks or days?
A. Oh, we were there several weeks.
Q. About what time—about how long, if you can state, was it till you saw Mr. Smith in Easton?
A. I don't have any idea.
42 Q. Was it two or three weeks?
A. I wouldn't like to say because I don't know anywhere near it.
Q. Whereabouts in Easton did you see him?
A. At the car.
Q. Your car?
A. No, the car he belonged in.
Q. What was he doing there?
A. I couldn't answer.
Q. When you saw him?
A. He wasn't doing anything; he just came down there.
Q. Did you see him in the car?
A. No, sir; he was out on the ground when I saw him.
Q. Walking around?
A. He was standing. I don't know whether he walked down there or rode. When I saw him he was standing.
Q. Did he continue to stand as long as you saw him?
A. Yes, sir.
Q. You didn't see him when he left?
A. No, sir.
Q. You don't know how long he stayed?
A. No, sir.
Q. Did he have his coat on?
A. I judge he did, it was cold weather.
Q. Do you remember whether he had his coat on?
A. I never taken that much notice.

Mr. Goldsborough:

Q. He was dressed like men ought to be in cold weather?
A. Yes, sir; he should have been if he wasn't.

Mr. Lewis:

Q. We want to get at the facts, the real truth. Just did you observe about Mr. Smith on that occasion that was different from what you had seen of him on previous occasions before the accident? His manner, movements etc.?
A. I asked him how he was getting along, he said his arm hurt him.
Q. I didn't ask you what he said, I asked you for what you saw. Just state what, if anything, you observed in his manner
43 and in his movements different on that occasion from other times that you had seen him before the accident?
A. I don't remember how he acted or anything about that. I merely stood there and talked with him. I went in the car to my work and left him standing there.
Q. As far as anything you now recall you saw nothing different, nothing to impress you different, from what he had always been before the accident?

(Objected to.) (Objection overruled.)

A. I didn't see anything only he stood there. I didn't examine the man any.
Q. You can't form any idea as to how long that was after the accident?
A. No, sir. I don't remember.
Q. Now can you approximate it in this way: Can you give any idea as to how long you remained at Easton after the accident?
A. I told you before I couldn't.
Q. You can tell whether it was two or six weeks?
A. We were there more than two weeks. We were there I think, three weeks.
Q. You were there three weeks after the accident?
A. No, sir.
Q. Could you form any idea as to the time between the happening of the accident and the time of your leaving as to whether it was shortly before you left or half of the time before you left or what? Can you form any idea about that? Just your judgment?
A. I couldn't come anywhere near it. It was some time after.
Q. It was some time after the accident?
A. Yes, sir.
Q. Was it some time before you left?
A. Yes, sir.
Q. Your judgment is you were there about three weeks after the accident?
A. Yes, sir.
Q. You don't know how Mr. Smith came there?
A. No, sir.

Q. Or how he went away?
A. No, I didn't ask him.
Q. You didn't see him coming or going?
A. No, sir.

Mr. Lewis: "I think that's all."

44 Redirect examination by Mr. Goldsborough:

Q. Now Mr. Carroll, you say you had some conversation with Mr. Smith at that time?
A. Yes, sir.
Q. You asked him how he was?
A. Yes, sir.
Q. What did he say?

(Objected to.) (Objection sustained.)

Q. What did he complain of?

(Objected to.) (Objection sustained.)

Q. Now Mr. Carroll at the time of your conversation with Mr. Smith state whether or not Mr. Smith made complaints about his physical condition?
A. He said he was sore.
Q. State the fact whether he did or didn't make complaint about his physical condition?
A. I don't remember whether he did or not. I asked him how he was, he said he was sore.
Q. Now, of course, as you stated to Mr. Lewis, you made no examination of him; he was dressed and it was winter time?
A. Yes, sir.
Q. You couldn't see under his clothes?
A. No, sir.
Q. You don't know what his physical condition was?
A. No, sir.

Isaac Newton, a witness of lawful age, produced on behalf of the plaintiff, after having been duly sworn, gave the following answers to interrogatories to him propounded:

Examined in Chief by Mr. Goldsborough:

Q. State your full name?
A. Isaac Alexander Newton.
Q. I. A. Newton.
A. Yes, sir.
45 Q. Where do you live?
A. Cheswold, Delaware.
Q. What is your employment?
A. I'm employed by the R. R. Co. as bridge carpenter.
Q. The Phila., Balto. & Washington R. R. Co?
A. Yes, sir.

Q. How long have you been employed by them?
A. About twenty-six years.
Q. Through what part of that time have you known the plaintiff?
A. About twenty-five years.
Q. How many years have you occupied the same cabin car or camp car with him?
A. I think about twelve years.
Q. About twelve years?
A. Yes, sir.
Q. Mr. Newton, state whether or not you remember any accident that happened to Mr. Smith at Greenwood, Delaware?

(The testimony as to all accidents except the one now sued for was stricken out by the Court at the close of the plaintiff's case.)

Q. Mr. Newton, were you one of the crew in the camp car at Easton occupied by Mr. Smith December 23, 1915?
A. Yes, sir.
Q. What time in the morning after the happening of the accident did you see him?
A. That a pretty hard question for me to answer. Somewhere, I should say, between nine and ten o'clock. Perhaps a little earlier than that.
Q. Who were you with when you came to the car?
A. I came to the car by myself. I was below the bridge and the conductor of the work train came through and told me our cook had been hurt and I better go to the car. When I got there Mr. Townsend was there and the doctor, as well as I recollect.
Q. Mr. Townsend?
A. Yes, sir.
46 Q. You say that you have occupied the same car with Mr. Smith for twelve years. State Mr. Smith's condition when you saw him that morning.
A. Well, Mr. Smith was in, I would say, bad shape, pretty bad condition. Of course as far as his injuries were I couldn't tell. I was no physician, but from the appearance of the man in his normal state and then he was in bad condition.
Q. From the condition of Mr. Smith that morning from his normal condition you would say he was in bad condition?
A. Yes, sir.
Q. Mr. Newton, what was the condition of the car to the north of the one occupied by Mr. Smith?
A. It was in bad condition. The end steps were torn out, as well as I recollect, the couplings were knocked off, the end timber was busted off and the rod twisted.
Q. Did you examine the inside of the car?
A. No, sir.
Q. Did you notice anything about the inside of the car occupied by Mr. Smith?
A. Only it was very much disarranged when I got there?
Q. State what you mean?
A. What we term "our furniture", was all in different places,

The jar knocked the stove loose from its proper place; the chairs were thrown around; water was over the floor. It didn't look homelike.

Q. Do you remember whether or not the partition was broken?
A. No, sir.
Q. When you say that do you mean it wasn't broken?
A. I didn't notice it.

Cross-examination by Mr. Lewis:

Q. You say Mr. Smith, when you saw him that morning, was, you thought, in pretty bad condition?
A. Yes, sir.
Q. How did he appear to be, frightened or nervous?
A. What?
47 Q. Did he appear to be frightened or nervous? Or what did you observe?
A. He seemed to be nervous and seemed to be suffering a great deal of pain, to me.
Q. Was he complaining of pain?
A. Yes, sir.
Q. Did you see any bruises or anything of that sort on him?
A. No, sir.
Q. You got there about the same time the doctor did?
A. The doctor had been there and gone when I got there.
Q. Mr. Townsend was still there?
A. I think he was, as well as I recollect, I wouldn't say positive.
Q. How many times during the day did you see Mr. Smith?
A. I left and went back to my work and I didn't see him any more till noon.
Q. How did he seem then?
A. I could see very little difference in his appearance. Of course his nerves settled some.
Q. Was he still in the cook car when you came up at noon?
A. He was in the car that was hit by the engine.
Q. Which car was he in when you first saw him?
A. He was in the cook car.
Q. Did he have his coat on when you first saw him?
A. No, sir.
Q. Was it put on while you were there?
A. Yes, sir.
Q. Was his coat put on him while you were there?
A. Yes, sir.
Q. Did he have difficulty in getting his coat on him?
A. I don't remember that.
Q. You saw him at noon. Did you see him any more that day after you went back to work?
A. No, sir.
Q. You didn't see him any more that day?
A. No, sir.
Q. When did you next see him?

A. I can't recollect when I did see him any more.

48 Q. Did you see him at any time while you were still at Easton?

A. I don't remember, I don't think I did.

Q. How long do you remember that you worked at Easton after the accident?

A. I don't remember that.

Q. Could you form some judgment about it?

A. I couldn't form any judgment because I don't keep any record of anything.

Q. Have you seen Mr. Smith any time since the accident till you saw him here at Court?

A. Yes, sir.

Q. When and where?

A. I couldn't answer that question.

Q. You couldn't answer where?

A. I couldn't do that.

Q. You know you saw him?

A. He came to the car wherever it was at; there's where I saw him.

Q. You mean the camp car.

A. Yes, sir.

Q. Can't you fix in your mind whether you were still at Easton when he came to the car?

A. No, sir.

Q. Do you remember where you went from Easton directly. When you moved your camp car from Easton where did you take it, do you remember?

A. No, sir.

Q. Were you here at the last October term of Court in Denton?

A. No, sir.

Q. Have you been in Denton before this time?

A. I never was in Denton but once. I passed through Sunday afternoon the past summer.

Q. Was it on that trip that you saw Mr. Smith?

A. No, sir.

Redirect examination by Mr. Goldsborough:

Q. Do you remember whether you came up to Queen Anne from Easton?

A. To my recollection that's where we come.

Q. Isn't that where you saw Mr. Smith?

A. That's where I think I saw him, I'm not positive.

49 Q. The camp car came up from Easton to Queen Anne?

A. Yes, sir.

Q. Mr. Smith lived at Queen Anne?

A. Yes, sir.

Q. That is where you think you saw him?

A. Yes, sir.

MILTON A. JONES, a witness of lawful age, produced on behalf of the plaintiff, after having been duly sworn, gave the following answers to interrogatories to him propounded:

Examined in Chief by Mr. Goldsborough:

Q. State your full name.
A. Milton A. Jones.
Q. Where do you live?
A. Clayton, Delaware.
Q. You have heard so much about Maryland and Delaware you don't hardly know where you live do you?
A. Yes, I think I live in Clayton.
Q. Now, Mr. Jones, what is your employment?
A. I'm employed as trainman on the Phila., Balto. & Washington R. R.
Q. Between what points were you running in December 1915?
A. Between Clayton Delaware and Oxford Maryland.
Q. Are you still on that run?
A. Yes, sir; most of the time.
Q. When you say "trainman" what do you mean?
A. At the time of the accident I was brakeman.
Q. On the same car which Mr. Eastman was conductor?
A. Yes, sir.
Q. Who was your engineer?
A. L. L. Mills.
Q. Mr. Jones, state whether or not the run which was made by the engine that day had ever been made before to your knowledge.
A. Yes, sir.
Q. For how long?
A. Ever since this siding was extended at Easton.
50 Q. How long has that been?
A. About three years ago. About one year prior to the time of the accident, to the best of my knowledge.
Q. At that time how long had the camp car been on the siding at the same place?
A. About two weeks.
Q. Had that run been made within two weeks?
A. Yes, sir.
Q. By what engineer?
A. By the same engineer we had.
Q. The same engineer, Mr. Mills?
A. Yes, sir.
Q. The run was made with one car that day?
A. Yes, sir.
Q Had it ever been made with more than one?
A. Yes, sir.
Q. By Mr. Mills?
A. He was engineer at the time the run was made.
Q. Was he the engineer at both times?
A. Yes, sir.
Q. To make this plain, it was stated yesterday by Conductor Easton that the fireman was handling the engine at the time the three cars were put on the track; the fireman was doing the work?
A. Yes, sir; at that time.

Q. Now Mr. Jones, at whose instance did the engineer make this run? Who told him to do it on the day of the accident.

A. I in person told him. I was instructed by the conductor. He was my superior officer. He gave me that message. Of course I'm under his charge. I was going under his instructions.

Q. What did you instruct the engineer to do?

A. I told him we were going to the Wholesale-Grocery run the switch we were going to let him up on this track where the camp cars were.

Q. You told him that?

A. Yes, sir.

Q. Mr. Jones, I'm not right sure that the gentlemen of the jury exactly understand. Will you explain how that is done, especially the location of the freight cars and of the cabin car and the
51 Easton Wholesale Grocery? The whole situation at that time.

A. As near as I can, I will. This morning the cars were there on this siding where the camp cars were. These cars were standing back about 150 feet clear. We went to the Easton Wholesale Grocery, a distance of several cars, then we had to have some start. We cut this car off and the engine went up the main track and across the crossing. Is that clear.

Mr. Goldsborough: "Yes.

Q. Mr. Jones, how far was it from the switch to the north end of this camp car, from the clearance of the switch.

A. About 150 feet.

Q. How long have you been a trainman?

A. Ten years.

Q. Will you state within what distance an engine making the run that was made that day should be able to stop after she passed the point of clearance?

A. In my judgment I should think 100 feet would be plenty room.

Q. How long is the engine and tender?

A. About seventy feet.

Q. I understood you to say last night she stopped within her length, about 70 feet?

A. No, that's too close.

Q. You would say 100 feet was plenty room?

A. I should think so.

Q. The engineer, Mr. Mills, knew that these camp cars were on the siding?

A. Yes, sir.

Q. He knew where they were located?

A. Of course.

Mr. Goldsbrough: "I think that's all".

Cross-examination by Mr. Lewis:

Q. Did you see the collision?

A. I heard the collision.

Q. I asked you if you saw it?
A. No, sir; I didn't see it.
52 Q. How far back were you?
A. I was at the point of the switch. I was cutting the car off.
Q. You were handling the switch?
A. No, I was cutting the car.
Q. Were you in full view from where you were standing?
A. The engine obstructed my view from the accident because I was right in back of it.
Q. Looking right down the track?
A. Yes, sir.
Q. Was the rate of speed at which the engine came out of that switch with the car greater than usual.
A. No, sir.
Q. The rate was only sufficient to run loose from the car and give you a chance to operate the switch.
A. Yes, that was all.
Q. How was it the engine didn't stop if it wasn't going faster than usual? It had been in the habit of stopping in that same distance?
A. Yes, sir; but I can't answer that.
Q. The rate was just about the same as usually employed?
A. Yes, sir, in my judgment.
Q. Did you see Mr. Smith after the accident?
A. No, sir.
Q. Did you see him that day?
A. No, I didn't see him any more that day.

HELEN L. KIRBY, a witness of lawful age, produced on behalf of the plaintiff, after having been duly sworn, gave the following answers to interrogatories to her propounded:

Examined in Chief by Mr. Goldsborough:

Q. Miss Kirby, where do you live?
A. Queen Anne.
Q. Who do you live with?
A. With my uncle, Mr. Smith.
Q. How long have you lived with him?
A. About fourteen years.
53 Q. You made your home with him about fourteen years?
A. ——
Q. Are you any relation to him?
A. He's my uncle.
Q. Your mother and father are not living?
A. My father is living, my mother is dead.
Q. You have been living with your uncle about fourteen years?
A. Yes, sir.
Q. Now Miss Kirby, do you remember the accident that has been testified to in this case?
A. Yes, sir.

Q. Were you living with your uncle at that time?
A. Yes, sir.
Q. Will you state to those gentlemen here just as near as you can what your uncle's condition was when he was brought home there?
A. Well, he was very sore on the right side and his right arm was in bad condition, he couldn't use it, and his chin was bruised.
Q. Do you know anything about the trouble with his chest?
A. Yes. Shortly after he was hurt he spit blood for three days and nights off and on.
Q. Was the doctor tending him?
A. The doctor had been.
Q. When he was spitting blood?
A. Not right at the time.
Q. Who was his physician?
A. Dr. Rowe.
Q. How long did he tend him after the accident?
A. Well, I should judge about two or three weeks.
Q. Has your uncle worked any since that time.
A. Well, no; of course he's not able to do manual labor.
Q. State why.
A. Simply because he can't use his right arm to any advantage.
Q. Do you know whether he has trouble with his right side?
A. Yes, sir; he seems to suffer with his right side.
Q. Does he seem to have pain?
A. He seems to. He says he's sore there.
54 Q. Your aunt, his sister, also lives with him?
A. Yes, sir.
Q. You are a school girl?
A. Yes, sir.

Cross-examination by Mr. Lewis:

Q. Your uncle is a pretty good complainer anyhow isn't he? Don't he grunt a good deal?
A. No, sir.
Q. He was no grunter?
A. No, sir; not unless he had good cause to be.
Q. You don't know whether he had cause or not, only what he said?
A. Well, of course I'm not a physician.

The plaintiff here closes his case.

Court: "All testimony relating to injuries to the plaintiff by the defendant except those resulting from the accident at Easton on December 23, 1915 is stricken out.

The defendant here offers a prayer to have the case taken from the jury, which prayer is rejected.

Dr. Jas. B. Merritt, a witness of lawful age, produced on behalf of the plaintiff, after having been duly sworn, gave the following answers to interrogatories to him propounded:

Examined in Chief by Mr. Goldsborough:

Q. What is your full name Doctor?
A. James B. Merritt, 3rd.
Q. You are a practicing physician at Easton, Maryland?
A. Yes, sir.
Q. You are a physician for the P. B. & W. R. R. Co., at Easton?
A. Yes, sir.
Q. Now Doctor, on the 23rd of December 1915 state to the gentlemen of the jury whether or not you were called to attend Mr. Smith, the plaintiff in this case?

55 A. I was called in the morning sometime about 8:30, I think, to come out to see a gentleman who turned out to be Mr. Smith, the gentleman here. I found him very much shocked, in a medical or surgical sense, what you called frightened or scared. He refused to go to the hospital or my office. I couldn't make a thorough examination and take off his clothes. I examined him the best I could. I found the breast bone was bruised and, he said, it was painful to touch. I also found his arm and elbow were bruised. I looked for broken bones but found none. I returned again about an hour after. He was better of his shock or scare and he told me he was going home. I didn't see him after that until today.

Q. Dr., what, if any, reason did he give you for not wanting to go to a hospital?
A. One reason he said he had a good doctor home.
Q. You don't mean to say that he reflected on your medical ability?
A. You can take it as you choose. He said something about my sister.
Q. Dr., did you attempt to make an examination of his side at all at that time?
A. I couldn't make a very careful examination without taking his clothes off. I wasn't prepared to give any treatment where he was. It would be punishing him to take his clothes off where he was.
Q. Was the car cold?
A. The car wasn't so cold, but he was scared. He was cold and shivering from fright. The movement of his arm seemed to be painful.

Mr. Lewis: "No questions."

Dr. H. W. B. Rowe, a witness of lawful age, produced on behalf of the plaintiff, after having been duly sworn, gave the following answers to interrogatories to him propounded:

Examined in Chief by Mr. Goldsborough:

Q. Doctor, will you give your full name, please sir?
A. H. Wilmer B. Rowe.

56 Q. Are you a practicing physician at Hillsboro?
A. I am.

Q. How long have you been engaged in the practice of medicine?
A. Since 1901, sixteen years.
Q. Sixteen years?
A. Yes, sir.
Q. Doctor, do you know the plaintiff in this case?
A. I do.
Q. How long have you known him?
A. Eleven years.
Q. Have you been his family physician during that time?
A. I have.
Q. Now Doctor, were you called in after Mr. *Rowe* came home from Easton on the 23rd of December 1915?
A. I was.
Q. Will you state to the gentlemen of the jury his condition?
A. I found a bruised condition of the chest, a contusion of the chest on the right side and in under the arm; also a bruised condition of the right arm that extended from the shoulder to the elbow.
Q. Did you examine him after that?
A. I did.
Q. How long after?
A. I saw Mr. Smith every day, possibly oftener than once a day, for about a week. On the second day I saw him he commenced to spit blood, which was a manifestation of traumatic pneumonia. His condition was very painful and it was very hard for him to move from one position to another. I couldn't make out any definite fracture of a bone; not any complete fracture of the ribs; that was a question, although I treated *him* the case just as if he had fractured ribs.
Q. You are not certain whether he had them or not?
A. No, I'm not positive; his condition was very painful. I simply gave him the benefit of the doubt and treated him just the same as if he had fractured ribs.
Q. You spoke of traumatic pneumonia; that means pneumonia from a blow?
A. Yes, sir.
Q. Doctor, what was the appearance of this contusion on the breast? How did it look to be from an external examination?
A. It was quite pronounced. I was certain at that time
57 there was a fracture of the ribs. It extended from the right of the breast bone, on the right side, beneath the line of the right arm; and the contusion on the right arm extended from the shoulder to the elbow.
Q. What was the external appearance of the contusion on the arm from the shoulder to the elbow?
A. Of course it was just like you would come in contact with something hard. It was evident he had quite a blow on the arm from some cause or other.
Q. Now Doctor, how long did you treat Mr. Smith at that time? I believe you said you treated him this week once a day or more?
A. For the first few days, or week.
Q. After that how long did he require treatment?

A. About two weeks, if I recall. Frequently after that I would stop in and ask how he was feeling, without giving any special treatment. I was positive it would take sometime for him to recover from that condition, if at all.

Q. You were positive it would take some time for the condition to be cured if it could be cured at all.

A. Yes, sir.

Q. Now doctor, what have you to say as to whether or not the injury to Mr. Smith's right arm and shoulder is permanent?

A. There is no question about the permanency of the injury.

Q. There isn't any question about it?

A. No, sir.

Q. What is it due to?

A. Undoubtedly it's due to the injury sustained at that time.

Q. What condition has that produced?

A. That has produced what we term a partial anochylosis or stiffness of the shoulder joint. That is caused by a rupture or injury to the lining itself; a strain of the ligaments.

Cross-examination by Mr. Lewis:

Q. Dr., you spoke about some sort of pneumonia when he had been spitting blood. What is the difference between that
58 kind of pneumonia and the pneumonia to the lungs?

A. Traumatic pneumonia is due to external causes; it's from an outside cause, but both has inflammation of the lungs.

Q. This pneumonia, are you sure it was produced by some concussion against his chest?

A. There were sufficient external manifestations to justify one in coming to that conclusion.

Q. How long did he spit blood?

A. From two to four days.

Q. How soon after you first saw him was it till he began to spit blood?

A. Within thirty-six hours; within forty-eight hours anyway.

Q. Was the character of the pneumonia that you speak of such that gave indications that he was real sick or ill and produced fever and had symptoms such as the other cases of pneumonia have?

A. Oh, yes, but it comes from external causes; from a blow or bruise of some kind.

Q. I think, Doctor, I may be mistaken (you know whether I'm right or not. Mr. Smith appeared to complain or act as if there was extreme soreness in his elbow. He appeared that way to me. I don't know whether he made that impression on you or not. I thought the stiffness was in his elbow instead of his shoulder. Is that a fact?

A. No, sir.

Q. There is no stiffness in his elbow?

A. I shouldn't judge so. I haven't examined him for some time.

Q. There was none when you last examined him?

A. Not to the extent that there was in the shoulder. In fact,

the elbow. I think was in fairly good shape the last time I examined him. It was mostly about the right shoulder.

Q. I think you said you found no evidence of a fracture of a bone either in the arm or side?

A. No, sir. I'm positive there was none to the arm. There was a question whether there was one to the ribs, but I treated him just the same as if they had been fractured.

Q. Did the condition respond to your treatment?

A. Which condition?

59 Q. The condition of the side?

A. It seemed so.

Q. What?

A. He seemed to get along pretty well with that; as well as one could expect. Those things mostly leave some permanent injury.

Q. That occurred on the 23rd of December 1915, and you treated him for about two or three weeks regularly?

A. Two weeks regularly, I think, but I saw him about another week subsequent to that.

Q. Have you examined him recently?

A. Not right recently. Not for several months.

Q. You can't say whether the conditions that were present when you treated him are still present?

A. It was the last time I examined him. If I remember correctly it was some time last summer.

Q. That bruised place isn't still there?

A. No, sir.

Q. Neither on his arm or side?

A. No, sir.

Q. Could you say when you examined him last that you observed any condition, other than he informed you, that was not normal? Did you see any condition there at that time that would indicate to you that he had been in an accident of any sort or had been hurt other than he told you he was sore here and there, could you see anything to indicate it?

A. The last examination I made of him was purely voluntary to see what was present for my own satisfaction. I didn't pay any attention to what he said. I found out for myself. There was a partial immobility of the right shoulder.

Q. What?

A. There was a partial immobility of the right shoulder.

Q. How did you ascertain that fact unless there was something to indicate it.

A. We generally find those things out after manipulating and examining the joint.

Q. You never put an "X Ray" on him?

A. No, sir.

Q. Dr., did you ever attend Mr. Smith prior to December 23rd, 1915?

A. I have.

Q. What was the trouble with him then?

A. Well, that question—I appeal to the Court. I don't
60 generally tell the trouble with patients. I don't know whether I'm required to answer the question.

Q. I mean was he sick or had he met with another accident?

A. No, this was a constitutional trouble not due to an injury.

Q. Was it a serious constitutional trouble; one that indicated that he was a man in good health?

A. At that time I would have classified him as being in good health.

Q. From your examination that day if you had been called upon to examine him for life insurance would you pass him?

A. A man of his age would be excluded from insurance.

Q. From your examination that day if you had been called upon to examine him for life insurance would you pass him?

A. Of course a man sick is not supposed to be insured. Mr. Smith was sick at the time. He is not supposed to be insured when he is being attended by a physician, consequently I would't pass him.

Q. This constitutional trouble he had would it disqualify him from manual labor?

A. After he recovered it wouldn't.

Q. He did finally recover from that constitutional trouble?

A. Yes, sir; he did.

Redirect examination by Mr. Goldsborough:

Q. Now Doctor, Mr. Smith's recollection is you examined him in September 1916. Does that refresh your recollection?

A. I examined Mr. Smith either in the summer or fall about six months ago. I don't know what month it was.

Q. As I understood you examined him for your own satisfaction?

A. Yes, sir.

Q. You paid no attention to what he told you?

A. No, sir.

Q. The conclusions you drew were from your examination?

A. Yes, sir.

61 Q. And not from what he said?

A. No, sir.

Q. Mr. Lewis called your attention to Mr. Smith holding his hand on his right side. I believe you said on your cross examination by Mr. Lewis that the injuries, such as he had, were apt to be permanent?

A. That is correct.

Q. Had Mr. Smith pain in his right side? Did he have when you examined him last?

A. The last time I examined him mostly to see the condition of the shoulder and arm, I don't recall.

Q. The last time you examined him did he complain of a pain in his right side?

A. I don't recall. I tried to find out myself without questioning him at all.

Recross-examination by Mr. Lewis:

Q. Dr., did you make that examination at the request of anybody, if so, whom?

A. There may have been one examination made at the request of some one. If I remember correctly this was made for my own satisfaction. I have made, in fact, two or three examinations of Mr. Smith since the accident occurred. The different dates of course I couldn't remember now.

Q. Did you observe any improvement in his condition at the last examination from the preceding one?

A. I did not.

Q. Did you examine his side?

A. I don't recall about his side. That wasn't the main trouble. I wanted to look at the arm and shoulder particularly.

Dr. ROWE after having testified yesterday evening asked permission to again take the stand for the purpose of making —, and further testified as follows:

Examined by Mr. Goldsborough:

Q. Dr., do you desire to make a statement?

A. Inasmuch as I understand there seems to be a misconstruction of what I meant when I testified about tending Mr. Smith
62 previous to the accident I would like to state that the condition didn't cast any reflection on Mr. Smith.

Mr. Lewis:

Q. From whom did you understand there was some misconstruction of what you said?

(This was objected to by counsel for the plaintiff).

Court:

Q. Was it any member of the jury?

A. It was not.

Court: "If you are going to say anything about it at all you have to say what was the matter with him."

Mr. Goldsborough:

Q. State what it was, Mr. Smith has no objection. Just state his condition at the time of the previous treatment.

Court: "You can state what was the matter with him, but you can't give your judgment as to whether it reflected on him or not. You can state that which you refused to say yesterday."

A. That's what I want to do. The trouble for which I treated Mr. Smith previous to the accident was simply a case of colonitis or inflammation of the gall duct connected with the liver; although

I don't offer any apology for my answer that I gave. I think that is a privilege I have of keeping it to myself?

"That's right unless the Court directs you to answer."

63 At the trial of this cause the defendant to maintain the issues on his part joined offered the following testimony:

Dr. McConnell, witness of lawful age, produced on behalf of the defendant, after having been duly sworn, gave the following answers to interrogatories to him propounded:

Examined in Chief by Mr. Lewis:

Q. Doctor, where do you live?
A. Wyoming, Delaware.
Q. You are a practicing physician I believe?
A. Yes, sir.
Q. How long have you been a practicing physician?
A. I graduated from college in 1914, June 6th and served one year in the Delaware Hospital, from July 1, 1914 to July 1, 1915.
Q. Since that time you have been engaged in active practice?
A. Yes, sir; since that time. From July 1, 1915 until April 1, 1916 at Roxanna, Delaware, and since that time at Wyoming, Delaware.
Q. While you were a physician at the Delaware Hospital did you treat Mr. Smith, the plaintiff in this case, if so for what?
A. According to the records of the hospital I did.

(Witness made further answer to this question which was stricken out by the Court upon the motion of counsel for the plaintiff.)

Q. Dr., did you hear the testimony of Dr. Rowe this morning and yesterday?
A. I did.
Q. In regard to the condition of Mr. Smith?
A. I did.
Q. Did you hear his testimony in regard to traumatic pneumonia?
A. I can't recall. I am not sufficiently familiar with the technical names of that sort of pneumonia—traumatic pneumonia.

64 Q. You heard his testimony in regard to it?
A. Yes, sir.

Q. What did that indicate? What permanency of injury does that indicate?

(Objected to.) (Objection overruled.)

A. Traumatic pneumonia in itself would indicate no more than any other pneumonia; pneumonia that you receive from a cold or the like. If it was a permanent injury many cases that have chronic pneumonia would be impaired the rest of their life, such not being the case.

Q. Did you hear Dr. Rowe's testimony in regard to the condition of Mr. Smith's side and his method of treatment?

A. I heard the whole thing, yes, sir. That answers your question I guess.

Q. What, if any indication of permanent injury was manifest or observable from the Doctor's statement of his condition—the condition of his side?

(Objected to.) (Objection overruled.)

A. That's a pretty hard question to answer to take it as it is; the injury to the side and the treatment that he gave in which he said there might or might not have been fractured ribs; he treated it as if they were fractures, which is the correct treatment, and in any case is no indication of permanent injury even though there had been fractured ribs. As an example use myself. I had three ribs broken and I have no permanent disability from it.

Q. Did you hear the Doctor's statement or testimony in regard to the injury to the arm between the elbow and the shoulder?

A. I also heard that, and from the description of the injury, without an X Ray Plate I don't see where th're justified in saying he has a permanent injury of the arm.

Q. Dr. Rowe described the injury to the chest, or bruise,
65 I believe, in connection with his side, I believe, I'm not sure. From the Dr's statement of the conditions what can you say about a permanent injury that was there?

A. The same as of the side. I would say there would be no permanent injury. Take a case, not only one case but a number of cases, take anybody as an example; there may be in any case, of course anything is possible in medicine, but as a general rule in a number of cases these things don't occur—permanent injuries.

Cross-examination by Mr. Goldsborough:

Q. Dr., how long do you say you have been practicing medicine?
A. Since June 1914.
Q. Where are you practicing now?
A. Wyoming, Delaware.
Q. When did you come to Denton?
A. Yesterday afternoon.
Q. At whose solicitation?
A. The R. R. Co's.
Q. Are you a physician of the Penna. R. R. Co.?
A. I am not.
Q. You are not their physician?
A. No, sir.
Q. You didn't come in response to a subpœna?
A. No, sir.
Q. You left your business to come here to testify for the R. R. Co., at their solicitation?
A. Yes, sir.
Q. Now, Dr., speaking about these injured ribs. How old a man are you?
A. Twenty-eight.

Q. When were your ribs broken?
A. August the 9, 1915.
Q. They were broken when you were twenty-six?
A. Yes, sir.
Q. Isn't that a very different proposition, a man breaking his ribs at twenty-six and at sixty-seven?
A. Broken ribs in a young man heal much quicker than in an old man.
66 Q. Now, Doctor, you have stated that a permanent injury isn't a necessary consequence of the injury to the side—injury to the ribs. As a matter of fact isn't it very hard to diagnosis, often, cases of broken ribs?
A. Indeed it is.
Q. As to whether a fracture took place?
A. Yes, it's almost impossible at times without an X Ray to tell whether ribs are broken or not.
Q. Are you prepared to say to this jury that the injury to Mr. Smith's side wasn't a permanent injury?
A. No, I'm not prepared to say that. I say, as a general rule, it's not, even in an old man of his age, it's not ordinarily a permanent injury.
Q. You don't know from the testimony you have heard in this case whether it's a permanent injury or not do you?
A. From the testimony that was given yesterday by Dr. Rowe the impression would be it would be a permanent injury.

Mr. Goldsborough: "That was my understanding."

Q. The injury to Mr. Smith's arm, which Dr. Rowe testified was permanent, are you in a position to say whether it was or not permanent?
A. From the testimony I heard I couldn't say it was permanent, although I don't think he's justified in calling it a permanent injury under the condition of the diagnosis.
Q. Do you undertake to say it's impossible to tell whether a man suffered a permanent injury to his shoulder without taking an X Ray?
A. No, sir; I think you misunderstood me. A man may have a permanent injury that can be diagnosed without an X Ray. As I understood the case—the testimony given by Dr. Rowe, there was no evidence of a fracture of the elbow or shoulder joint or any of the bones. I also understood there was no dislocation but there was a bruise, from the description given by him, it was only a minor bruise at that.
Q. Are you in a position to say there was no permanent injury suffered there?
A. No, I couldn't say there was no permanent injury.
67 Q. You don't know whether there was or not?
A. No, sir; I don't know.

Redirect examination by Mr. Lewis:

Q. I understood you to say that according to Dr. Rowe's testimony as to the affection of the shoulder and arm, in your judgment, it wouldn't be permanent?

A. It wouldn't according to Dr. Rowe's testimony. There is no reason whatever for it being permanent.

Q. And the same of the side?

A. And the same of the side.

Q. You don't mean to say the conditions might not be different in some respect?

A. I couldn't.

Q. You are basing your opinion on what he said?

A. Yes, sir; the evidence he gave to the Court here yesterday.

Recross-examination by Mr. Goldsborough:

Q. Are you prepared to say to the jury that from the testimony in this case that you have heard that this man hasn't a stiffness in his shoulder that creates a permanent injury?

A. I could not.

Defendant's Testimony.

GEORGE LARRIMORE, a witness of lawful age, produced on behalf of the defendant, after having been duly sworn, gave the following answers to interrogatories to him propounded:

Examined in Chief by Mr. Lewis:

Q. Mr. Larrimore, where do you live, sir?

A. Harrington.

Q. What is your occupation and how long have you been so occupied?

A. Foreman of carpenters for the P. B. & W. R. R. Co.

68 Q. How long have you been so employed?

A. Twenty-six years; not foreman all that time.

Q. You have been in the employ of the R. R. that long?

A. Yes, sir.

Q. Are you acquainted with the plaintiff in this case?

A. Yes, sir.

Q. How long have you known him?

A. About twenty-five years.

Q. Have you known him intimately during that time?

A. Yes, sir.

Q. What do you know of his general health during these twenty-five years?

A. Well, Mr. Smith has not always been a strong man, as you or I are, I don't suppose, but he was able to tend to his duties such as he had to perform.

Q. What was his employment during that length of time?

A. He was a carpenter laborer before he done the cooking.
Q. He did cook?
A. Yes, sir.

Mr. Goldsborough:

Q. He was employed as carpenter laborer?
A. Yes, sir. That's the way we have them on our roll.

Mr. Lewis:

Q. So there may be no misunderstanding, what is a carpenter laborer?
A. He's a man that does labor work; works with the carpenters. The rate of his pay causes him to be rated as a laborer; a low rate of pay.
Q. Do you mean he worked as a carpenter?
A. No, sir; he worked with them.
Q. But not as a carpenter?
A. No, sir.
Q. State what, if any physical defects you have observed in Mr. Smith during this time that you have known him?
A. I don't know any particular defect in him at all only
69 he wasn't a man that had been used to very hard work. He was a man that would be likely to be easier hurt than I would because he didn't do that kind of work that would make him hard. I never knew of any particular defect.
Q. Did he complain of any physical defect during this time?
A. Not particularly so, no.
Q. I don't refer to sickness, but to any lame arm or limb?
A. Yes, I heard him complain of some of his hurts.
Q. Did you observe they effected him?
A. Yes, he had a weak knee. I don't remember where he got hurt or the circumstances.
Q. He had it?
A. Yes, sir; he had it.
Q. Did he have a lame arm?
A. I think he had a lame wrist but not his arm, that I know of.
Q. Did either of these defects interfere in his earning capacity outside the particular employment that he had?

(Objected to.) (Objection sustained.)

Q. Do you know anything about Mr. Smith having received a blow on the head any time that was more than usual or produced any bad effect?
A. I think he did get hurt on the head once Mr. Lewis, but I don't remember when.
Q. Did you observe any bad effects from that?
A. He never complained much from them, not that I remember of.

Q. Did you ever know him to have an attack of vertigo or anything of that sort?
A. No, sir.
Q. Did he or not faint and fall off a car at Dover one time?
A. I can't tell anything only what I know. I don't know it.
Q. You didn't see it?
A. No, sir.
Q. Where were you on the 23rd day of December 1915?
A. In Baltimore.
70 Q. Where was your employment at that time?
A. Easton, Maryland.
Q. What was your employment at that time?
A. Building concrete piers for bridge abutments; concrete abutments.
Q. Where was Mr. Smith at that time?
A. He was there at Easton.
Q. Engaged as what?
A. Cook, as far as I know. I left there the 21st and never returned until the 27th.
Q. When you returned was Mr. Smith where he was when you went away?
A. No, sir.
Q. How soon after your return did you see Mr. Smith?
A. I don't just know Mr. Lewis how long it was. It might have been two or three weeks. He came down one day to see the boys.
Q. Where?
A. Easton, I think. I'm not certain but I think it was Easton.
Q. Some two or three weeks?
A. Yes, sir.
Q. Do you know how he came down?
A. No, sir.
Q. What was his condition as far as you observed at that time?
A. Well, he was what I considered in pretty bad shape. He wasn't able to work. He was able to move around some, but he wasn't able to perform any duties.
Q. He was not able to work?
A. No, sir.
Q. Do you know what age man Mr. Smith is?
A. I think Mr. Smith is in his 69th, I'm not sure. When he first came to work I think he was forty-six or seven years old. He was too old to get in the relief because the age limit was forty-five. I think he's sixty-nine.
Q. I think he said he was in his seventieth?
A. Maybe he is, I'm not certain about that.

Mr. Lewis: "I think that's all."

71 Cross-examination by Mr. Goldsborough:

Q. Mr. Larrimore, in speaking of bridge laborers, as I understand your testimony he was a bridge laborer or an assistance to bridge carpenters?

A. No, he's a man unskilled in carpentering. The reason he is called a laborer is on account of the rate of pay he receives. We place them on the roll as carpenter laborers. That means they work with the carpenters.

Q. That means he worked with the carpenters?

A. Yes, in that respect; he never was engaged in the work.

Q. He never was a carpenter?

A. No, sir.

Q. The carpenters he was engaged to work with were bridge carpenters?

A. We're called bridge carpenters, but our gang done principally bridge work.

Q. As I understand you it was principally bridge work your gang did?

A. Yes, sir.

Q. Those were bridges over which trains run between the states of Maryland and Delaware?

A. Yes, sir.

Q. They were all trains that ran between more than one state?

A. Yes, sir; on that branch—two states.

Q. Mr. Larrimore, how long did you know Mr. Smith right intimately?

A. Twenty-five years ago he first came to work in our gang. I think. I have been working one year longer than him. I think it has been twenty-five years since he commenced.

Q. During that time were you right closely associated?

A. Yes, sir; we were together except about eighteen months during that time when he was with another gang.

Q. You were speaking of the injury to his knee. Did he have that when you first knew him?

A. No, sir.

Q. Mr. Larrimore, if he had that injury when did he get it?

A. I don't remember dates.

Q. Was it in the service of the R. R. Co.?

A. Yes, sir; while he was working for the R. R. Co.

72 . Q. The injury to his arm, did he have that when he came to work for the R. R. Co.?

A. I said his wrist. That happened after he came.

Q. In the course of his work with the R. R. Co.?

A. Yes, sir.

Q. The blow on his head that you have testified to, did he have that injury when he came to work for the Company?

A. No, sir.

Q. He also received that in the service of the R. R. Co.?

A. Yes, sir.

Mr. Goldsborough: "That's all."

Redirect examination by Mr. Lewis:

Q. Do you mean to say that he received those injuries while at work, or during the time, day or night, when he might not be working?

A. He might not be at work, but he was on the job. He was on duty. Most of these hurts he had to my personal knowledge. I can't say much about them. I'm engaged on my work and I'm not right around where he is at because I have to be with the men.

(The witness here made further answer to this question which was stricken out by the Court.)

Q. Is it or not a fact that the injuries referred to occurred in the night time?
A. Some of them did. I remember well one didn't occur in the night.
Q. One that didn't?
A. No, sir; but I don't know just when or how, but one of them was in the day time: The lick he got on the head.
Q. Where did that one occur?
A. In the car.
Q. At what point on the road?
A. I just don't know. I think we were moving from one point to another.

Mr. Lewis: "I think that't all."

Mr. Goldsborough: "That's all, thank you Mr. Larrimore."

73 ALFRED H. SMITH, the plaintiff in this cause, produced on behalf of the defendant, after having been duly sworn, gave the following answers to interrogatories to him propounded:

Examined in Chief by Mr. Lewis:

Q. Mr. Smith, you have been sworn already, you were sworn yesterday?
A. Yes, sir.
Q. You are, of course, under oath and it is not necessary to swear you over again.
A. Yes, sir.
Q. Mr. Smith, had you prior to the 23rd of December 1915 received any permanent injury from any source at all?
Witness: "The day I was hurt?"
Mr. Lewis: "No, before that time."
A. Oh, yes, this wrist and this elbow and this shoulder. (Indicating).
Q. Now then Mr. Smith, how was the use of that wrist affected before the Easton affair? How did it interfere with your work?
A. It would make me awful tired in the wrist working bread and it pained me sometimes and would swell up.
Q. It would make you tired?
A. Yes, in the wrist. It would make me tired to work bread or wash dishes or lift pots or kettles.
Q. It interfered greatly with your work?
A. At times it did and other times when the work wasn't so heavy it wasn't so hard on me.

Q. Could you cut wood with it?

A. I couldn't cut wood very good with it, or I can't cut wood now.

Q. How did it affect you if you went to dig with a hoe, work in the garden or anything of that sort?

A. Just about the same as I told you about cooking or washing dishes. When ever I gripped anything tight there always seemed to be something in there that would squeak.

74 Q. You spoke about your elbow and shoulder. Did they interfere with you before?

A. I was off quite a while with my elbow and wrist and shoulder, but this joint here (indicating) gives me trouble today, but I think that is rheumatic. It has been for years, ever since I was hurt.

Q. You didn't have rheumatism there before you were hurt?

A. No, sir; never.

Q. As far as your left arm, wrist, elbow and shoulder are concerned, was or not your ability to work impaired? Could you do as much work after as before?

A. Oh, yes, at times I could when the work was light; when I didn't have such a big gang.

Q. Take all sorts of work, could you do as much after as before?

A. Yes, I could do as much work.

Q. Since as before?

A. What do you mean?

Q. I'm talking about the time you got your left arm hurt, from that time on down could you do as much work after you were hurt as you could before?

A. No, sir; in these latter years I couldn't.

Q. Is it or not a fact, Mr. Smith, that these injuries to your left arm and shoulder, as you grow older become more noticeable to you?

A. Yes, sir.

Q. They handicap you more than when you were younger?

A. Oh, yes.

Q. Did you have any other affection that interfered with your moving about and engaging in work?

A. Nothing only his knee. (Indicating).

Q. That was before the accident down at Easton?

A. Yes, that was at Seaford.

Q. Were you lame in that knee?

A. I have been lame ever since in that knee. I can't step over a twelve inch board, twelve inches high. I can't step over a board twelve inches high without stumping my toe.

Q. How does it affect you going up stairs?

A. I have to step this foot first and put the same foot on the same step. If you notice me you will find I'm telling the truth.

75 Q. I want to know if that affection of your knee didn't interfere with your ability to make a living in the general affairs and occupation of life?

A. I could do my work with it all right; what I had to do.

Q. Suppose your work caused you to walk considerable?

A. I would be very tired in it at night. I had a good bit of walking to do in the car on a hard floor.

Q. Short walks?

A. It was walking to and fro from one place to another, bringing water and the like.

Q. Did it or not affect your ability to move around lively and quick and keep it up a good while?

A. Oh, I could knock around a good bit, but not like I used to.

Q. Did or not that affection of your knee get a little more noticeable as the years piled on the top of your head and you got a little less hair?

A. That was a swinging shelf that fell on my head.

Q. That didn't take the hair off?

A. No, that didn't take the hair off.

Q. I don't think you quite get the force or meaning of my question.

A. What's that?

Q. I asked you—I meant to ask you whether or not this affection of your knee, whether or not it didn't affect you a little more as you got old, pain you a little more and interfere with you getting around as you grew old?

A. At times it did and other times it didn't. When I had to work very hard; when I had a big crowd of men on or anything of the kind; I had often some distances to go to get water and go up and down five steps to get into the car; it was very tiresome on me and would be on anybody else.

Q. That leg got tired quicker than the other?

A. Yes, sir; it did.

Q. Now what other disability did you have, Mr. Smith, before you got into this accident down here at Easton—physical disability?

A. I don't know that I got any, no.

Q. Did that swinging shelf fall on you? Where did it hit you?

A. Here on the side of the head. (Indicating) Along
76 here. (Indicating) It skinned my head. That was done by getting in a freight train going to Oxford.

Mr. Lewis: "This time it doesn't seem to make much difference whether it was done by the Company or who. It was the condition we're talking about."

Witness: "Oh Yes. The Co.'s doctor that tended me is dead."

Mr. Lewis: "If he hadn't been we would have him here I expect."

Witness: "That would be all right; he would have to tell you the truth."

Q. That was Dr. Wilson, was it?

A. No, indeed.

Q. That lick on your head, did you feel the effects of it clear up to the time you had the accident at Easton?

A. No, I didn't. It was several years I felt the effect. As I told you yesterday when I stooped down and come up I could see ten thousand stars in front of me.

Q. Did you ever have vertigo?

A. No, sir; I don't know what that was. I never had vertigo in my life.

Q. Isn't it a fact that you fell out of a car?

A. I'll tell you how I fell out. Billy Potter (he is here) he was with me. We were cleaning the car, cleaning up. He went to help me in. I got hold of the hasp of the door to pull myself in. When I went to straighten up on my feet my hand slipped and I went backward and fell on top of my head and it knocked my senses out of me. Billy Potter will tell you. The doctor was there; I suppose I didn't know what I was talking about. I suppose I told him I had vertigo. I had no senses. My senses didn't come for two hours.

Q. Do you feel any effect of that fall now?

A. No, not a bit.

77 Cross-examination by Mr. Goldsborough:

Q. Mr. Smith, I understood you to say that your wrist had been hurt?

A. I told you yesterday this wrist had been hurt. (Indicating).

Mr. Goldsborough: "That you said yesterday has been stricken from the record."

Witness: "Has it?"

Q. Mr. Smith, I understood you to say your wrist had been hurt?

A. Yes, sir.

Q. Where was your wrist hurt?

A. It was hurt the first place in the West Yard.

Q. Where is the West Yard?

A. Wilmington.

(This was objected to by counsel for the defendant).

Court: "That hasn't anything to do with this case."

(Objection sustained.) (Exception noted.)

Court: "The objection is sustained because under the pleading in this case there can be no recovery for injuries received by the plaintiff prior to the 23rd of December 1915, and as counsel has stated he didn't ask the question for the purpose of discrediting the witness it's not admissible for any other purpose."

Mr. Goldsborough:

Q. Now, Mr. Smith, you say that wrist has been injured twice?

A. Yes, sir.

Q. And your elbow how many times?

A. It was injured twice.

Q. Injured twice?

A. Yes, sir; and this shoulder once. (Indicating).

78 Q. You injured the right knee?

A. Yes, sir.

Q. How do you have to go up stairs?

A. I have to put this foot (indicating) up on the step first and pull

this up and put it on there, then take the other step. It takes both feet on one step. That's the way I have to go. The're men right here in the audience now that can tell you so.

Q. Mr. Smith, as I understand it, you say these injuries which you received didn't preclude you from performing your duties?

A. No, sir.

Q. You were able before the 23rd of December 1915 to do your work?

A. Yes, sir.

Q. You heard no complaint?

A. No, sir; I heard no complaint.

Q. About your ability to do your work?

A. No, sir; I had my meals on time. If they wanted it at ten o'clock I would hurry up and get it ready so they would get it at ten o'clock.

Q. To take a train somewhere?

A. Yes, sir. They didn't have to give me more than twenty-five minutes but what I could give them a meal and let them go, and they will tell you so.

Q. At the time of your injury at Easton how long had you been in the service of the Company?

A. Twenty-six years, six months and three days.

Q. You were sixty-seven—sixty-eight at the time of the injury?

A. I was in my 68th.

Q. You would be pensioned at seventy wouldn't you?

A. Yes, sir.

Redirect examination by Mr. Lewis:

Q. Does the R. R. Co. pension men who are employed by the hour and not the day?

A. I couldn't tell you but I rather think they do. I'm not sure.

79 GEORGE A. DEAKYNE, a witness of lawful age produced on behalf of the defendant, after having been duly sworn, gave the following answers to interrogatories to him propounded:

Examined in Chief by Mr. Lewis:

Q. Mr. Deakyne, I believe you live in Denton?

A. Yes, sir.

Q. What is your occupation and what has it been for the last several years?

A. Life Insurance business; life insurance agent.

Q. Have you the American Mortality Table?

A. Yes, sir. I have. Do you want it?

(Table is here produced.)

Q. Look at it please. Whose is that?

A. This is the American expectancy table. This table was prepared by Shepard & Homer based on the experience of sixty-eight thousand people who have been accepted by the Mutual Life In-

surance Company; the table most used in the United States for the calculation of reserve.

Q. This is the table?

A. Yes, sir.

Q. Look at that table and state what is the probability of life, the duration of life, of a man seventy years old?

A. The expectancy in years is eight years and forty-eight one hundredths.

Q. Eight years and forty-eight one hundredths.

A. Yes, sir; eight years and forty-eight one hundredths.

Q. What kind of a man is that? I mean as to the state of health?

A. That is based on passing a medical examination by their medical examiner and a policy issued thereon.

(The witness here made a further statement which was stricken out by the Court.)

Q. What you meant to say was that applied to a man who would pass?

A. Yes. This table is based on those 68,000 people that had already passed.

80 Q. People they had accepted as insurable risks?

A. Some of them might be insurable risks and some might not.

Mr. Lewis: "I think that's all I want to ask him."

Cross-examination by Mr. Goldsborough:

Q. You say that is for seventy years. How much would it be at sixty-nine?

A. 8 and 97/100.

Q. Nearly nine years?

A. Yes, sir.

Q. Nearly nine years expectancy?

A. Yes, nearly nine years expectancy.

Q. I understood you to say the expectancy at sixty-nine was 8 96/-00 and at seventy years it was 8 and 48/100. Now as a matter of fact does the Company actually insure after sixty-five?

A. In our rate book we have nothing in there after sixty-five, but of course in some few instances they take them a little older.

Q. As a matter of fact examinations for insurance are never made, as far as your rate book is concerned, after sixty-five?

A. No, sir; we haven't any rates on any kind of a policy after sixty-five.

Q. As a matter of fact a man who actually lives to be sixty-nine or seventy is a healthy man anyhow?

(Objected to. Objection sustained.)

Mr. Lewis: "I think that's all."

Court: "Any rebuttal?"

Mr. Goldsborough: "We have nothing, no, sir."

The testimony in the above entitled case was closed on Tuesday April 10, 1917, at 3:10 o'clock P. M.

JOHN J. HARTNETT,
Court Stenographer, 2nd Judicial Court of Md.

81 At the conclusion of all testimony the plaintiff offered the following prayers:

Plaintiff's First Prayer.

The Court instructs the jury that if they find from the evidence that the defendant, Philadelphia, Baltimore and Washington Railroad Company, was and has been since the twenty-third day of December, 1915, a body corporate, and further find that on the said twenty-third day of December, 1915, the defendant was a common carrier by railroad engaged in carrying freight and passengers between the States of Maryland and Delaware, and further find that on the said twenty-third day of December, 1915, the plaintiff, Alfred H. Smith, was employed by the said defendant railroad company to take care of a car in which he and certain bridge carpenters ate, slept and lived, and to keep the car clean, make the beds, buy the food, prepare and cook it; and further find that the said bridge carpenters were employed by the defendant to build and repair bridges in the States of Maryland and Delaware, over which bridges ran the trains of the defendant engaged as aforesaid in carrying passengers and freight between the said States of Maryland and Delaware; and further find that the said bridge carpenters and the plaintiff had a common boss under whose directions the plaintiff performed his duties, and further find that the said car went back and forth between the States of Maryland and Delaware as the work of the said bridge carpenters required, and further find that on the aforesaid twenty-third day of December 1915, the aforesaid car of the defendant was located on the side track at the town of Easton, Maryland, where it had been placed by the agents of the defendant, and was coupled at each end to a car of the defendant, and further find that the said bridge carpenters were then engaged in repairing bridge abutments below Easton over which ran the trains of the defendant engaged as aforesaid in carrying passengers and freight between the said State of Maryland and Delaware, and further find that a locomotive engineer employed by the defendant and engaged in running an engine which transported freight between the

82 States of Maryland and Delaware, negligently ran the said engine into the said car and injured the plaintiff, and further find that at the time of said injury the said plaintiff was in the car assigned to him by the defendant and was in the performance of his duties and exercising due care, then the verdict of the jury must be for the plaintiff.

Plaintiff's Second Prayer.

The Court instructs the jury, that if they find a verdict for the plaintiff, then in estimating the damages they are to consider the health and condition of the plaintiff before the injuries complained of, as compared with his present condition in consequence of said injuries, and whether the same are in their nature permanent and how far, if at all, they are calculated to disable him from engaging in those employments for which, in the absence of such injuries, he would have been qualified, and also the physical and mental suffering, if any, to which he was subjected by reason of said injuries, and to allow him such damages as in the opinion of the jury would be a fair and just compensation for the injuries suffered.

The Court granted the plaintiff's first and second prayers; to the granting of which the defendant excepted and prays the Court to sign this his second Bill of Exceptions, which was accordingly done this 6th day of September, 1917.

W. H. ADKINS. [SEAL.]
PHILEMON B. HOPPER. [SEAL.]

83 *Docket Entries.*

And the defendant offered the following two prayers.

Prayers.

(Filed April 1st, 1917.)

First.

The Jury are instructed that in making up their verdict in this case they shall consider only the injury that is alleged to have been committed at Easton, Maryland, on December, 23rd, 1915, irrespective of any alleged injuries that the plaintiff may have suffered while in the employ of the defendant prior thereto, and in assessing and awarding any damage that he may have suffered in consequence of said injury, they may take into consideration the physical condition of the plaintiff on and prior to the said 23rd day of December, 1915, together with his age at the time, his earning capacity, the probable duration thereof, as compared with his earning capacity since the happening of said alleged injury, and may award such damage, if any, as would in their judgment be just and equitable in the circumstances of this case.

Granted.

Second.

The Jury are instructed that in making up their verdict in this case they cannot allow the plaintiff damages for any injuries the

plaintiff may have suffered prior to December 23rd, 1915, but they may consider such previous injuries as bearing upon the question whether plaintiff's present condition is due in whole or in part to said previous injuries or whether it is due wholly or in part to the alleged injury of December 23rd, 1915.

Granted.

It is agreed that the aforegoing is a correct Bill of Exceptions in this case.

Attorney for Plaintiff.

HENRY R. LEWIS,
Attorney for Defendant.

84 STATE OF MARYLAND,
Caroline County, To wit:

I hereby certify that the aforegoing is truly and faithfully taken and copied from the record and proceedings in the Circuit Court for Caroline County in the therein entitled case.

In Testimony Whereof, I hereto set my hand and affix the seal of the said Court this 6th day of September, 1917.

[SEAL.] LAWRENCE B. TOWERS,
Clerk.

Costs in Circuit Court for Caroline County.

Plaintiffs,	$58.70
Defendants including record	60.00

Test:

LAWRENCE B. TOWERS,
Clerk.

Court of Appeals of Maryland, January Term, 1918.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY

vs.

ALFRED H. SMITH.

Judge Thomas delivered the opinion of the Court.

This appeal is from a judgment recovered by the appellee against the appellant in the Circuit Court for Caroline County under the Federal Employers' Liability Act.

The original declaration contained several counts, to some of which, including the first count, the defendant demurred. The demurrer was overruled, but as all the counts except the first were subsequently stricken out on motion of the plaintiff before the case was submitted to the jury, the first count is the only one to be considered.

The ruling of the Court on the demurrer was made the ground of the first bill of exception. That ruling appears on the face of the record, and it was unnecessary and irregular to include it in the bill of exceptions. 2 Poe's P. & P., section 312 and cases cited in note, and Expressman's Assn. vs. Hurlock, 91 Md., p. 591. The only remaining exception is to the granting of the plaintiff's first and second prayers.

Apart from certain objections to the form of the declaration and plaintiff's first prayer, to which we shall hereafter refer, the important ground of this appeal is that the averments of the declaration and the evidence in the case do not bring the plaintiff within the provisions of the act relied on.

The defendant, the Philadelphia, Baltimore and Washington Railroad Company, operated a branch line of its railroad from the town of Clayton, in the State of Delaware, to the town of Oxford, in the State of Maryland, over which it transported passengers and freight in interstate and intrastate commerce. The plaintiff was employed by the defendant as a "carpenter laborer", in connection with a gang of bridge carpenters employed by the defendant in the repair of its bridges and bridge abutments. The gang, including the plaintiff, worked over the entire line of the defendant, and were moved from point to point thereon, as the repair of the bridges and bridge abutments of the defendant required, in what was called a camp car, furnished and moved by the defendant, in which they ate, slept and lived. The principal duties of the plaintiff were to take care of the camp car, keep it clean, attend to the beds and prepare and cook the meals for himself and the other members of the gang. On the 23rd day of December, 1915, the bridge carpenters were engaged in repairing a bridge abutment of the defendant on its said line below Easton, Maryland, and the camp car was on a side track of the defendant at Easton, where it had been placed by the defendant, and was coupled at each end to a car of the defendant. On the day named, and while the plaintiff was engaged in the camp car in cook-

ing dinner for the bridge carpenters and himself, the engineer of a train of the defendant, without any warning to the plaintiff, ran the engine on the side track and against the car to which the camp car was coupled with such force that it threw the plaintiff over a chair and against the door of a clothes press inflicting the injuries for which he seeks to recover in this case.

That the injury complained of was caused by the negligence of the defendant seems to be conceded, but learned counsel for the appellant e-rnestly insists that the plaintiff was not at the time he was injured engaged in interstate commerce within the meaning of the Federal statute. Among the cases he relies on are McBain vs. Northern Pac. Ry. Co., 160 Pac. Rep., 654; Killes vs. Great Northern Ry. Co., 161 Pac. Rep., 69; Shanks vs. Delaware & L. R. R. Co., 239 U. S., 556; Chicago etc. R. R. Co. vs. Harrington, 241 U. S., 177, and Delaware etc. R. R. Co. vs. Yurkonis, 238 U. S., 444.

In McBain's case, the plaintiff at the time of his injury "was going from his caboose to the yard office to present a requisition for supplies needed upon the caboose whenever it should be called into service." But the train to which the caboose was to be attached had not been made up, and whether it would, when called into service, be attached to a train engaged in interstate or in intrastate commerce had not been determined, and the Court therefore held that it did not appear that the plaintiff, at the time he was injured, was engaged in interstate commerce. In Killes' case, the plaintiff was injured while building a scaffold to be used by him in painting a freight shed, and the Court held that he was "not engaged in an act so directly and immediately connected with the interstate commerce as substantially to form a part thereof or necessary incident thereto." In Shanks' case, the Court held, "where a railroad company, which is engaged in both interstate and intrastate transportation, conducts a machine shop for repairing locomotives used in such transportation, an employe is not engaged in interstate commerce while taking down and putting up fixtures in such machine shop." In Harrington's case, the Court said: "The switching crew of which Harrington was a member did not work outside of this State and was engaged, at the time of his death, in switching coal belonging to the defendant, and which had been standing on a storage track for some time, to the coal shed, where it was to be placed in bins or chutes and supplied, as needed, to locomotives of all classes, some of which were engaged or about to be engaged in interstate and others in intrastate traffic." After quoting the statement in Shanks' case that "the true test of employment in such commerce in the sense intended is, was the employe at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it", the Court said further: "Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supplied in a convenient place from which it could be taken as required for use." In the Yurkonis case, the plaintiff was injured while he was preparing to mine coal in a mine or colliery owned by the defendant, and the Court said: "The injury happening when plaintiff was preparing to mine the coal was not an injury happening

in interstate commerce and the defendant was not then carrying on interstate commerce."

The decisions referred to and relied on by the appellant rest upon the theory that the work in which the plaintiff was engaged was not so closely related to interstate commerce as to be practically a part of it, and are readily distinguished from the case at bar. Here the bridge carpenters were employed in repairing the bridges of the defendant, which were necessary for the maintenance of its road and the conduct of interstate commerce in which the defendant was then engaged. The work done by the plaintiff, and for which he was employed by the defendant, was in furtherance and in aid of the work performed by the carpenters. He was a member of the gang and subject to the control of the boss of the gang, and was performing his duties on the property of the defendant and in a car furnished by the defendant as one of the instrumentalities engaged in the maintenance of its road, and we think the case falls clearly within the reasoning and principle applied in Pedersen vs. Del., Lack. & West. R. R. Co., 229 U. S., 146. In that case the Court said: "The defendant was operating a railroad for the transportation of passengers and freight in interstate and intrastate commerce, and the plaintiff was an iron worker employed by the defendant in the alteration and repair of some of its bridges and tracks at or near Hoboken, New Jersey. On the afternoon of his injury the plaintiff and another employe, acting under the direction of their foreman, were carrying from a tool car to a bridge, known as the Duffield bridge, some bolts or rivets which were to be used by them that night or very early the next morning in 'repairing that bridge', the repair to consist in taking out an existing girder and inserting a new one. The bridge could be reached only by passing over an intervening temporary bridge at James Avenue. These bridges were being regularly used in both interstate and intrastate commerce. While the plaintiff was carrying a sack of bolts or rivets over the James Avenue bridge, on his way to the Duffield bridge, he was run down and injured by an intrastate passenger train, of the approach of which its engineer negligently failed to give any warning.

"The Circuit Court ruled that an injury resulting from the negligence of a co-employe engaged in intrastate commerce was not within the terms of the Federal Act, and the Circuit Court of Appeals, although disapproving that ruling, held that under the evidence it could not be said that the plaintiff was employed in interstate commerce and therefore he was not entitled to recover under the act.

"Considering the terms of the statute, there can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employe is employed by the carrier in such commerce; but it is not essential, where the casual negligence is that of a co-employe, that he also be employed in such commerce, for, if the other conditions be present, the statute gives a right of recovery for injury or death resulting from the negligence 'of any of the * * * employees of such carrier', and this includes an employe engaged in intrastate commerce.

"That the defendant was engaged in interstate commerce is conceded, and so we are only concerned with the nature of the work in

which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reason unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of the opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? * * * Of course we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such.

"True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce.

"The point is made that the plaintiff was not at the time of his injury engaged in removing the old girder and inserting the new one, but was merely carrying to the place where the work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the round-house to the track on which are the cars he is to haul in interstate commerce."

Among the cases cited by the Court in Pedersen's case is the case of Johnson vs. Southern Pac. Ry. Co., 196 U. S. 1, where the Supreme Court held that a dining car while on a side track awaiting the arrival of a passenger train to which it was to be attached was engaged in interstate commerce within the meaning of a statute requiring cars so engaged to be equipped with automatic couplers. In refer-

ence to the argument that the dining car could not be said to be engaged in commerce while on the side track, the Court there said: "Confessedly this dining car was under the control of congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip." Pedersen's case is cited and approved in a number of the later decisions of the Supreme Court. Shanks vs. Del. & L. R. R. Co., supra; N. Y. Central R. R. Co. vs. White, 243 U. S., 188, and Southern Ry. Co. vs. Puckett, 244 U. S., 571. In the case of Oliver vs. Northern Pac. Ry. Co., 196 Fed., 432, the Court said in reference to a Pullman car porter, who was employed by the railway company: "Persons employed as the deceased was come within the spirit of the statute, and those dependent on them for support should not be denied the protection its affords," and in Robinson vs. B. & O. R. R. Co., 237 U. S., 84, it seems to have been conceded that if the Pullman car porter had been employed by the railroad company he would have been entitled to the benefit of the act as employed in interstate commerce. In the case of B. & O. R. R. Co. vs. Whitacre, 124 Md., 411, (affirmed in 242 U. S., 169), where the plaintiff, who was employed by the railroad company as a brakeman, was injured while hunting a tool boy to get a tin cup for the use of the crew, this Court held that at the time of the accident he was engaged in interstate commerce, and after referring to the case of N. Car. R. R. Co. vs. Zachary, 232 U. S., 248, said: "Certainly the act of the fireman in going to his boarding-house was no more an act connected with interstate commerce than was the act of Whitacre in hunting for a tool boy in order to obtain a tin cup for the use of the crew on its trip."

If the plaintiff had, through the negligence of the defendant, sustained the injuries complained of while he and the other members of the gang were being transported in the camp car over the defendant's line from a point in Delaware to a point in Maryland to repair a bridge in the latter State, his right to recover under the Federal Act could not have been questioned under the decisions referred to and many others that might be cited. How then can the fact that the camp car was temporarily located on a siding of the defendant in Maryland, while the carpenters were repairing a bridge there, before being moved to some other point on the line, perhaps in Delaware, for the same purpose, alter the relations of the work in which the plaintiff was employed to interstate commerce? The camp car, plaintiff and carpenters were, at the time of the injury, employed by the defendant in the repair of its road, which was essentially and directly related to the interstate commerce in which the defendant was engaged, and we see no good reason why the plaintiff under the circumstances should be denied the protection of the act relied on.

In reference to the declaration the appellant further contends that it does not allege that the plaintiff was in the camp car at the time he was injured, but we do not think the nar. is open to that criticism. It avers that the principal work assigned to the plaintiff "was to take care of the aforesaid car in which he and the other employees of the defendant (bridge carpenters) ate and slept, to keep it clean, to make the beds, to buy the food and prepare and cook it"; that at the time he was injured he "was cooking dinner for himself and the other em-

ployees of the defendant as aforesaid", and that as a result of the collision between the engine and the car to which the camp car was coupled he was thrown "some ten feet against the door casing and partition", and sustained the injuries of which he complains.

The objections to the plaintiff's first prayer are that it was misleading in that it required the jury to find facts that were not necessary to entitle the plaintiff to recover, and omitted certain other facts which would have justified the jury in bringing in a verdict different from the one rendered. In regard to the first objection it is only necessary to say that the defendant has no reason to complain that the prayer imposed on the plaintiff a burden he was not required to assume. The facts claimed to have been omitted from the prayer are that the camp car had been on the siding for two or three weeks prior to the day of the injury, and that the defendant was engaged in both intrastate and interstate commerce. This objection is disposed of by what was said by the Court in Pedersen's case, supra, and Oliver's case, supra.

No objection was urged to the plaintiff's second prayer, which relates to the measure of damages and is in the usual form, and as we find no errors in the rulings of the Court below the judgment must be affirmed.

Judgment affirmed with costs.

Filed February 27th, 1918.

Court of Appeals of Maryland, January Term, 1918.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Body Corporate,

vs.

ALFRED H. SMITH.

Appeal from the Circuit Court for Caroline County.

1918 February 27th. Judgment affirmed, with costs.
Opinion filed.
Op. Thomas, J. To be reported.

Appellant's Cost in the Court of Appeals of Maryland:

Record	$100.00	
Brief	.....	
Appearance Fee	10.00	
Clerk	1.30	
		$111.30

Appellee's Cost in the Court of Appeals of Maryland:

Brief	$30.00	
Appearance Fee	10.00	
Clerk	1.45	
		$41.45

STATE OF MARYLAND, *sct:*

I, C. C. Magruder, Clerk of the Court of Appeals of Maryland, do hereby certify that the foregoing is truly taken from the record and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk, and affixed the seal of the Court of Appeals, this ninth day of May, A. D. 1918.

[Seal Court of Appeals, Maryland.]

CALEB C. MAGRUDER,
Clerk of the Court of Appeals of Maryland.

STATE OF MARYLAND, *sct:*

I, Caleb C. Magruder, Clerk of the Court of Appeals of the said State, do hereby certify that the said Court is the highest Court of law and equity in said State in which a decision can be had. I further certify that the aforegoing is a true transcript of record, opinion of the Court, with short copy of judgment thereon, in the case there stated.

In Testimony Whereof, I hereunto subscribe my name and the seal of the Court of Appeals of Maryland affix this ninth day of May in the year nineteen hundred and eighteen.

[Seal Court of Appeals, Maryland.]

CALEB C. MAGRUDER,
Clerk of the Court of Appeals of Maryland.

95 Court of Appeals of Maryland.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY,

v.

ALFRED H. SMITH.

On Appeal from Circuit Court of Caroline County, Maryland.

Stipulation.

It is hereby stipulated by and between the parties to the above entitled cause, that the Transcript of Record from the Court of Appeals of Maryland, now on file in the Supreme Court of the United States, file No. 26,548, being case No. 472 on the calendar of said Supreme Court, is a true transcript of all proceedings had in this Court of Appeals in said cause and that same shall remain upon the files of the Supreme Court of the United States as though now returned to said Court in compliance with the requirements of the Writ of Certiorari issued out of said Supreme Court in said cause.

It is further stipulated that the Clerk of the Court of Appeals of Maryland may make return to said Writ of Certiorari by attaching thereto a certified copy of this stipulation in lieu of other return to said writ.

HENRY R. LEWIS,
Attorney for Appellant.
T. ALAN GOLDSBOROUGH,
Attorney for Appellee.

MARYLAND, *sct:*

I, Caleb C. Magruder, Clerk of the Court of Appeals of Maryland, do hereby certify that the foregoing is truly taken and copied from the original Agreement now on file in the said Court, in the case there stated.

In Testimony Whereof I hereunto subscribe my name and the seal of the Court of Appeals of Maryland affix this sixth day of November nineteen hundred and eighteen.

[Seal Court of Appeals, Maryland.]

CALEB C. MAGRUDER,
Clerk.

96 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Maryland, Greeting:

Being informed that there is now pending before you a suit in which Philadelphia, Baltimore & Washington Railroad Company is appellant, and Alfred H. Smith is appellee, which suit was removed into the said Court of Appeals by virtue of an appeal from the Circuit Court of Caroline County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certifed by the said Court of Appeals and re-

97 moved into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of October, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

98 [Endorsed:] File No. 26,548. Supreme Court of the United States, No. 472, October Term, 1918. Philadelphia, Baltimore & Washington Railroad Company vs. Alfred H. Smith. Writ of Certiorari.

99 [Endorsed:] File No. 26,548. Supreme Court U. S., October Term, 1918. Term No. 472. Philadelphia, Baltimore & Washington Railroad Co., Petitioner, vs. Alfred H. Smith. Writ of Certiorari and Return. Filed November 7, 1918. .

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 1081.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, PETITIONER,

vs.

ALFRED H. SMITH.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

To the Honorable the Supreme Court of the United States:

Your petitioner, Philadelphia, Baltimore and Washington Railroad Company, is a corporation, organized and existing under the laws, among others, of the States of Pennsylvania and Maryland, and is now and at the time of the occurrence and proceedings hereinafter recited was engaged in the business, both interstate and intrastate, of

a common carrier by railroad, and as such was at all times subject, in so far as immediately applicable in the circumstances, to the laws both of the United States and of the respective States above mentioned.

Respondent Alfred H. Smith, an employee of petitioner, brought action in the Circuit Court of Caroline County, State of Maryland, to recover under the provisions of the Federal Employers' Liability Act of April 22, 1908, as amended April 5, 1910, to recover damages for personal injuries suffered by him under the following circumstances:

Respondent (plaintiff below), as averred in count one (all other counts having been stricken out prior to verdict, R., 2) of his declaration, "was employed as cook *for other employees* of the defendant (petitioner here) *engaged in interstate commerce* (chiefly bridge carpenters engaged in building and repairing bridges of the defendant in different States, over which the defendant ran its cars engaged in interstate commerce), his duties requiring him to go back and forth between the States as employment of the aforesaid employees of the defendant, for whom he cooked, required; * * * that the work assigned to him principally was to take care of the aforesaid car (a so-called camp car), in which he and the other employees of the defendant ate and slept, to keep it clean, to make the beds, to buy the food, prepare and cook it" (R., 3); that on the day of the accident and consequent injuries to him the camp car in which he and the bridge carpenters mentioned

were quartered "was located on the side-track in the town of Easton, Maryland," and "*certain agents and employees of the defendant engaged in interstate commerce,* negligently and carelessly ran an *engine of the defendant engaged in interstate commerce* with great force into the said cars, throwing the plaintiff, who was cooking dinner for himself and the other employees of the defendant as aforesaid, some ten feet against a door casing and partition," greatly injuring him (R., 4), to his damage, as claimed, in the sum of $15,000 (R., 8). (Italics supplied.) To this count your petitioner demurred, and to the overruling of the demurrer duly noted exception (R., 9).

On the trial plaintiff Smith testified that he "was to do the cooking, clean the car, make the beds, and do anything my (his) boss asked me (him) to do" (R., 15). At the time in question the men who occupied the car, bridge carpenters, "were making a cement abutment on the iron bridge" below Easton, over which bridge freight trains and passenger trains ran from Clayton, Delaware, to Oxford, Maryland (R., 26). At the time of the accident the camp car had been lying on the siding "about three weeks" (R., 19); the damage was caused by "a freight" train (R., 17) which customarily passed the camp car while so located "twice a day, once up and once down" (R., 19).

On behalf of plaintiff it was further testified that the food for the bridge gang was not provided by your petitioner, but was purchased by plaintiff

Smith for account of himself and associates: "we kept an account of the meals and at the end of the month we divided the meals with the amount of money spent. Each man paid his board" (R., 35).

After the accident the camp car and bridge gang remained at Easton "several weeks" (R., 41). "We were there, I think, three weeks" (R., 43).

On behalf of your petitioner it was testified that plaintiff was employed as a "carpenter laborer" "a man unskilled in carpentering" * * *. We place them on the roll as carpenter laborers. That means they work with the carpenters. The carpenters in this gang worked on bridges "over which trains run between the States of Maryland and Delaware" (R., 71).

At the conclusion of all testimony the learned trial court, over the objection of your petitioner, charged the jury that if they should find—

> "that on the said 23rd day of December, 1915, the defendant was a common carrier by railroad engaged in carrying freight and passengers between the States of Maryland and Delaware, and further find that on the said twenty-third day of December, 1915, the plaintiff, Alfred H. Smith, was employed by the said defendant railroad company to take care of a car in which he and certain bridge carpenters ate, slept and lived, and to keep the car clean, make the beds, buy the food, prepare and cook it; and further find that the said bridge carpenters were employed by the defendant to build and repair bridges in the States of Maryland and Delaware, over which bridges ran the trains of

the defendant engaged as aforesaid in carrying passengers and freight between the said States of Maryland and Delaware; and further find that the said bridge carpenters and the plaintiff had a common boss under whose directions the plaintiff performed his duties, and further find that the said car went back and forth between the States of Maryland and Delaware as the work of the said bridge carpenters required, and further find that on the aforesaid twenty-third day of December, 1915, the aforesaid car of the defendant was located on the side-track at the town of Easton, Maryland, where it had been placed by the agents of the defendant and was coupled at each end to a car of the defendant, and further find that the said bridge carpenters were then engaged in repairing bridge abutments below Easton over which ran the trains of the defendant engaged as aforesaid in carrying passengers and freight between the said States of Maryland and Delaware, and further find that a locomotive engineer employed by the defendant and engaged in running an engine which transported freight between the States of Maryland and Delaware, negligently ran the said engine into the said car and injured the plaintiff, and further find that at the time of said injury the said plaintiff was in the car assigned to him by the defendant and was in the performance of his duties and exercising due care, then the verdict of the jury must be for the plaintiff."

To such charge your petitioner likewise duly excepted (R., 82). The jury returned its verdict in

favor of plaintiff for $4,000 and judgment was so entered (R., 2).

On appeal to the Court of Appeals of Maryland this judgment was affirmed, that learned court, after stating its appreciation of certain cited cases, including Shanks *vs.* Delaware & Lackawanna R. R. Co., 239 U. S., 556; Chicago, &c., R. R. Co. *vs.* Harrington, 241 U. S., 177, and Delaware, &c., R. R. Co. *vs.* Yurkonis, 238 U. S., 444, saying:

> * * * "The decisions referred to and relied on by the appellant rest upon the theory that the work in which the plaintiff was engaged was not so closely related to interstate commerce as to be practically a part of it, and are readily distinguished from the case at bar. Here the bridge carpenters were employed in repairing the bridges of the defendant, which were necessary for the maintenance of its road and the conduct of interstate commerce in which the defendant was then engaged. The work done by the plaintiff, and for which he was employed by the defendant, was in furtherance and in aid of the work performed by the carpenters. He was a member of the gang and subject to the control of the boss of the gang, and was performing his duties on the property of the defendant and in a car furnished by the defendant as one of the instrumentalities engaged in the maintenance of its road, and we think the case falls clearly within the reasoning and principle applied in Pederson *vs.* Del., Lac. & West. R. R. Co., 229 U. S., 146."

Having quoted at length from the opinion of this Court in Pederson's case, the learned court of appeals concluded its opinion as follows:

> * * * "If the plaintiff had, through the negligence of the defendant, sustained the injuries complained of while he and the other members of the gang were being transported in the camp car over the defendant's line from a point in Delaware to a point in Maryland to repair a bridge in the latter State, his right to recover under the Federal act could not have been questioned under the decisions referred to and many others that might be cited. How then can the fact that the camp car was temporarily located on a siding of the defendant in Maryland, while the carpenters were repairing a bridge there before being moved to some other point on the line, perhaps in Delaware, for the same purpose, alter the relations of the work in which the plaintiff and carpenters were, at the time of the injury, employed by the defendant in the repair of its road, which was essentially and directly related to the interstate commerce in which the defendant was engaged, and we see no good reason why the plaintiff under the circumstances should be denied the protection of the act relied on."

Your petitioner is advised that the learned Court of Appeals of the State of Maryland, in holding the case at bar to be ruled and controlled by the decision in Pederson's case (229 U. S., 146), committed error, in that it failed to give consideration or effect to the distinguishing fact that in that case the injured plaintiff, who "was an iron worker em-

ployed by the defendant (a carrier by railroad engaged in both interstate and intrastate commerce) in the alteration and repair of some of its bridges and tracks," and at the time of his injury "was carrying from a tool car to a bridge, known as the Duffield bridge (regularly used in both interstate and intrastate commerce), some bolts or rivets which were to be used * * * in repairing that bridge," while in the case at bar the plaintiff, though employed and paid by your petitioner and serving under a common boss with the bridge carpenters, had no part or place with them in the work of altering or repairing or building, as the case may have been, the bridge on your petitioner's interstate line between Clayton, Delaware, and Oxford, Maryland; nor was plaintiff at the time of the injury to him performing any work "so closely connected" with interstate commerce "as to be a part of it," for the work about which he was then engaged, that is cooking dinner for the carpenters who were engaged in repairing that bridge, specifically, basting a "big turkey" and "boiling water for the potatoes" was "work being done independently of (the) interstate commerce in which defendant was engaged," and its performance was "a matter of indifference so far as that commerce was concerned."

Your petitioner is further advised that the learned Court of Appeals of Maryland, as well as the Circuit Court for Caroline County, committed error in matter of Federal law of widespread and general importance in declining to uphold peti-

tioner's demurrer to count one of plaintiff's declaration, and in assuming for purpose of submitting the case to the verdict of the jury, that in the circumstances disclosed by the evidence and above outlined, plaintiff suffered the injuries of which he complained while he was employed by petitioner in interstate commerce, the fact being that at the time of injury, and for at least three weeks prior thereto, he was and had been acting and working as mess cook and camp cleaner or attendant for a gang of bridge carpenters, who were quartered for their own convenience in a camp car belonging to petitioner, which was not being moved in interstate commerce but was located and standing on a switch track in the neighborhood of the bridge upon which the carpenters were then and for three weeks prior thereto had been and for at least three weeks thereafter, were working. While the camp car and its equipment were the property of petitioner, they were not moving nor were they in any manner engaged in interstate commerce, while the food which plaintiff at the moment of the injury was engaged in cooking was the sole property of himself and the carpenters, and at least until consumed by the latter and by alimentary processes had become transmuted into physical energy, was without relation, either express or implied, to interstate commerce within the purview of said Federal Employers' Liability Act, and therefore the preparation and cooking of such food by plaintiff did not and should not have been held to constitute the employment of plaintiff in interstate commerce at the

time when the injuries complained of were inflicted upon him.

Petitioner respectfully prays that in the interest of uniformity as well as of certainty in the application of the provisions of the Federal Employers' Liability Act of 1908 in the numerous cases which have arisen and are likely in future to arise in circumstances and facts more or less analogous to those existing in the case at bar, a writ of certiorari, as authorized by section 251 of the Judicial Code Act of March 3, 1917, as amended by the act of September 6, 1916, be issued out of this Honorable Court to the Chief Justice and Associate Justices of the Court of Appeals of Maryland, commanding them to transmit to this Court, on or before a day to be specified therein, a full and true transcript of the record and all proceedings, including the judgment had in said court of appeals, in order that the same may be here reviewed, and such further orders and judgments may be entered herein as right and law and justice may require.

And petitioner will ever pray, &c., &c.

THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY,
By FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
Its Attorneys.

STACY B. LLOYD,
HENRY R. LEWIS,
Of Counsel.

BRIEF.

Construing and limiting the provisions and effect of the Federal Employers' Liability Act of 1908, with particular reference to whether an injured employee was engaged in interstate commerce at the time of the injury received, this Court had said (per Van Devanter, A. J.) that—

> "Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce. The act was so construed in Pederson *vs.* Delaware, Lackawanna & Western Railroad Co., 229 U. S., 146. It was there said (p. 150): 'There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce. Again (p. 152): 'The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?' And a like view is shown in other cases."
>
> Illinois Central R. Co. *vs.* Behrens, 233 U. S., 473.

Again in Erie R. Co. *vs.* Welsh, 242 U. S., 303, it was said (per Pitney, A. J.), that—

> "* * * * the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform

> a task in interstate commerce is not sufficient to bring the case within the act (Illinois Central R. R. Co. *vs.* Behrens, 233 U. S., 473, 478)."

and the plaintiff there, a yard conductor on an interstate railway, injured while alighting from a slowly moving freight engine for the purpose of reporting to the yardmaster's office for further orders, all previous orders having been executed, was held not to have been employed in interstate commerce so as to render applicable in the circumstances the act above referred to, although the orders which he would have received had he not been injured would have required him immediately to make up an interstate train.

There is no similarity in the duties which were being performed by the plaintiff below and the plaintiff Pederson (229 U. S., 146) when they received their respective injuries for which suits were brought.

Pedersen was himself a bridge carpenter, concerned generally about and with the repairs then being made to his employer's bridge which was then being used both in interstate and local commerce, and at the moment of injury was actually engaged in bringing up repair material for use of himself and associates in the performance of their immediate and current duties.

In the case at bar we have a similar bridge, similarly used for the movement of both interstate and local commerce, and similarly undergoing repair,

but Smith was not a bridge carpenter, was not engaged on or about the work being done on the bridge, and had no closer relation to interstate commerce than a dishwasher or a laundryman who was solely employed at a railway station eating house where meals are served or sheeted beds are furnished for the use of employees and travellers over the railroad, would have.

It is respectfully submitted that the error committed in the premises by the learned Court of Appeals of Maryland, if not shortly corrected, will likely influence the decisions of other State courts, and of the Federal district courts in the many cases and questions which are arising and will continue to arise and be litigated before them under the provisions of the Federal Employers' Liability Act of 1908, as amended, and therefore the question and matter presented in and by the annexed petition for certiorari is of such large and general importance as will fully justify the favorable exercise of the discretionary power of this Honorable Court as conferred by the provisions of the Judicial Code.

FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for Philadelphia, Baltimore & Washington R. R. Co., Petitioner.

STACY B. LLOYD,
HENRY R. LEWIS,
Of Counsel.

To T. ALAN GOLDSBOROUGH, ESQUIRE,
Attorney for Alfred M. Smith:

Please take notice that on Monday, October 7, 1918, at 12 o'clock noon, or so soon thereafter as counsel may be heard, we will submit to the Supreme Court of the United States for its consideration and action the beforegoing petition for writ of certiorari and brief in support thereof.

FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for P., B. & W.
R. R. Co., Petitioner.

Service of foregoing notice with copy of petition and brief referred to acknowledged this — day of ——, A. D. 1918.

Attorney for Alfred H. Smith,
Respondent.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY,

PETITIONER,

vs.

ALFRED H. SMITH.

In the Supreme Court of the United States.

No. 1081—October Term, 1917.

Petition for Writ of Certiorari to the Court of Appeals of Maryland.

RESPONDENT'S BRIEF.

The petition for the writ of Certiorari in this case and the brief in support of it appear to be based on the proposition that a man cooking cannot be engaged in interstate commerce within the meaning of the Federal Employer's Liability Act.

FACTS BEARING ON THE ABOVE PROPOSITION.

The petitioner is a common carrier with a main line from Philadelphia, Pennsylvania, to Cape Charles, Virginia, running through the States of Pennsylvania, Delaware, Maryland and Virginia. It has a branch line known as the Oxford Branch, running from Clayton, Delaware, to Oxford, Maryland, a distance of fifty-four miles. Fifteen miles of the road is in Delaware, and the remainder, some thirty-nine miles, in Maryland. Easton is a station in Maryland on the Oxford Branch. The respondent was employed by the petitioner as a carpenter laborer and was engaged with a gang of bridge carpenters who worked all over the lines in the different States wherever bridges or bridge abutments needed repair, over which ran the petitioner's trains.

Record, page 69—

"Q. What was his employment during the length of time? A. He was a carpenter laborer but ('before' in the record by mistake) he done the cooking.

Q. He did cook? A. Yes, sir.

Mr. Goldsborough:

Q. He was employed as a carpenter laborer? A. Yes, sir. That's the way we have them on our roll.

Mr. Lewis:

Q. So there may be no misunderstanding, what is a carpenter laborer? A. He's a man that does labor work; works with the carpenters. The rate of his pay causes him to be rated as a laborer; a low rate of pay.

Q. Do you mean he worked as a carpenter? A. No, sir; he worked with them.

Q. But not as a carpenter? A. No, sir."

Record page 71:

"Cross Examination by Mr. Goldsborough.

Q. Mr. Larrimore, in speaking of bridge laborers, as I understand your testimony he was a bridge laborer or an assistant to bridge carpenters? A. No, he's a man unskilled in carpentering. The reason he is called a laborer is on account of the rate of pay he receives. We place them on the roll as carpenter laborers. That means they work with the carpenters.

Q. That means he worked with the carpenters? A. Yes, in that respect; he never was engaged in the work.

Q. He never was a carpenter? A. No, sir.

Q. The carpenters he was engaged to work with were bridge carpenters? A. We're called bridge carpenters, but our gang done principally bridge work.

Q. As I understand you it was principally bridge work your gang did? A. Yes, sir.

Q. Those were bridges over which trains run between the states of Maryland and Delaware? A. Yes, sir."

A car in which the gang ate, slept, and lived went back and forth between the States with the bridge gang. On the twenty-third of December, 1915, the car, generally called a camp car, was on a siding below Easton, the gang being engaged in repairing bridge abutments on a bridge below Easton over which ran the interstate passenger and freight trains of the petitioner. As indicated above, these trains were all either trains which were going from the State of Maryland into the State of

Delaware or h[illegible] come from the State of Delaware into the State of Ma[illegible]land. The duties of the respondent and those in which he had been engaged along with the bridge gang for nearly twenty-seven years (Record page 78.)

("Q. At the time of your injury at Easton how long had you been in the service of the company? A. Twenty-six years, six months and three days.

Q. You were sixty-seven—sixty-eight at the time of the injury? A.—I was in my 68th.

Q. You would be pensioned at seventy wouldn't you? A. Yes, sir.")

were principally to take care of the camp car, to keep it clean, attend to the beds, and prepare and cook the meals for the gang, including himself. The men, including the respondent, and the boss of the gang, who was also the respondent's boss, bought their food together, the camp car, as above indicated being the place indicated by the petitioner in which the respondent should perform his duties. On the above date a freight train on its run from Oxford to Clayton carrying insterstate freight, stopped at Easton to pick up a freight car being loaded at the Easton Commission Company's warehouse. The engineer, with the engine tender, went into the warehouse siding, pulled out the car, pulled the car in on the main track and then made what is called a flying switch, that is, gave the car ahead of the engine impetus so that it would go back and couple with the balance of the freight train while the engine itself cut loose and went back on the siding on which was located the camp car. The engineer knew the camp car was on the siding and its location, which was one hundred and fifty-four feet back from what is known as the "clear" of the switch. The record discloses that the engineer negligently ran the engine with great violence against the car to which the camp car was coupled, partly demolishing one end of it. The collision caused the cars, of which the camp car was one, to move south, when they ran into other cars. The plaintiff describes the accident as follows (Record page 17):

"Q. Now Mr. Smith, what were you doing on the

23rd day of December, 1913? A. I was getting dinner. I was cooking a big turkey, and a freight came along between eight and nine o'clock. They always gave me warning before when they were coming in on that track. I had been to the stove to baste the turkey. I had two kettles of boiling water for the potatoes. I just started after them when they struck me. I was knocked about ten feet and bruised my chin.

The witness continuing further states: When they struck the other two cars before I could recover they knocked me over a chair and my shoulder struck here (indicating). I had no use of my shoulder since. If I have to 'bust' any wood I have to put the axe here (Indicating) I can't cut wood. My whole dependence is on the R. R. Co., with a sister and niece."

ARGUMENT.

A dining car, on an interstate run, is engaged in interstate commerce:

Johnson vs. Southern Pacific Co. 196 U. S. 1, 21; 49 L. Ed. 361, 371.

If a dining car, attached to an interstate train, is engaged in interstate commerce, then clearly a waiter or cook on a dining car being the employees, the peformance of whose duties make it possible for the dining car to perform the only function which it is to perform, is engaged in interstate commerce.

Can a man cooking a meal in the kitchen of a dining car for the comfort of an interstate passenger on an interstate train be said to be engaged in interstate commerce with any more force than a man cooking a meal for a workman repairing a bridge over which runs trains engaged in insterstate commerce, and whose contract with the railroad requires him to cook that meal in one of its cars located on the line of the railroad at the nearest point possible to the place where the bridge worker is engaged, so as to facilitate the work.

On page 13 of the brief filed with the petition for a writ of certiorari the petitioner says, referring to the re-

spondent's work, "and had no closer relation to interstate commerce than a dishwasher, or a laundryman who was solely employed at a railway station eating house where meals are served or sheeted beds are furnished for the use of employees and travellers over the railroad, would have."

Everyone must eat, **everyone** must have laundry done, dishes in general must be washed, and a dishwasher, laundryman or **cook** in a railway eating house, permanently located and disconnected with any **special work going on**, has no possible analogy to the case of a cook whose contractual duty requires him to cook on a camp car located on the tracks of the railroad, and as close as possible (in order to facilitate the work) to a special gang engaged in interstate commerce, of which gang he is one. If, instead of the instant case of one man of a gang of bridge workers being, for reasons of economic expediency, singled out to cook, each bridge worker was under contract to cook his meals, while on duty, on a car of his employer located on its tracks at a point as near as possible to the bridge work, in order to facilitate the quick return of the worker to the bridge being repaired, would the petitioner for one moment contend that the bridge worker, injured while cooking his meal, by the negligence of a fellow servant engaged in interstate commerce, was not entitled to the protection of the act in question.

In Mondou vs. N. Y. N. H & Harford R. Co., 223 U. S. 6, 48, this Court said:

"As is well said in the brief prepared by the late Solicitor General: 'Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act,

commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure. Therefore, Congress may legislate about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act.'' ''

Repectfully submitted,

T. ALAN GOLDSBOROUGH,

Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 472.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, PROSECUTOR,

vs.

ALFRED H. SMITH, RESPONDENT.

MOTION TO AFFIRM THE JUDGMENT OF THE COURT OF APPEALS OF MARYLAND OR IN LIEU THEREOF TO ORDER THE CAUSE PLACED ON THE SUMMARY DOCKET

and

BRIEF IN SUPPORT THEREOF.

T. ALAN GOLDSBOROUGH,
Attorney for Respondent.

(26,548)

Supreme Court of the United States.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, Prosecutor
vs.
ALFRED H. SMITH, Respondent.

Motion to affirm the judgment of the Court of Appeals of Maryland or in lieu thereof to order the cause placed on the summary docket.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The respondent, Alfred H. Smith, moves the Court to affirm the judgment of the Court of Appeals of Maryor in lieu thereof to place this cause on the summary docket for the month of March, 1919. This cause comes into this Court on a writ of certiorari granted on the 21st day of October, 1918.

The sole question involved is whether or not the respondent was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act at the time he received the injuries which resulted in this suit. The motion is based on the following reasoning;

1. The instant case is that of a man (the respondent) cooking a meal for workmen repairing a bridge over which run trains engaged in interstate commerce and whose contract with the railroad requires him to cook that meal in one of its cars located on the line of the railroad at the nearest point possible to the place where the bridge workers are engaged so as to facilitate the work, and who while cooking the meal, was injured by the negligence of a fellow servant engaged in interstate commerce.

2. That there is no qualitative and probably no quantitative difference between the instant case and the following;

(a) A man cooking a meal in the kitchen of a dining car for the comfort of an interstate passenger on an

interstate train (a dining car on an interstate train is engaged in interstate commerce, Johnson vs. So. Pac. Co. 196 U. S. 1, 21; 49 L. Ed. 361, 371;if a dining car, attached to an interstate train, is engaged in interstate commerce, then clearly a waiter or cook on a dining car, being the employees, the performance of whose duties make it possible for the dining car to perform the only function which it is to perform, is engaged in interstate commerce).

(b) A man cooking a meal in the caboose of an interstate freight train for the conductor and brakemen of the train in order to feed them on the run and thus facilitate the movement of interstate freight.

(c) A bridge worker engaged in repairing a bridge over which run trains engaged in interstate commerce, under contract to cook his meals, while on duty, on a car of his employer located on its tracks at a point as near as possible to the bridge work, in order to facilitate the quick return of the worker to the bridge being repaired, and injured while cooking his meal, by the negligence of a fellow servant engaged in interstate commerce.

(d) A man acting as a pullman porter on an interstate run, this being essentially domestic service.

Oliver vs. N. P. R. Co. 196 Fed. 432.
Robinson vs. B. & O. R. Co. 237 U. S. 84, 59 L. Ed. 849.

(e) A man acting as an operator of a railroad pumping plant which furnishes water for interstate engines.

Horton, etc. vs. Oregon W. R. & Nav. Co. 72 Wash. 503, 132 P. 897, 47 L. R. A. (N. S.) 8.

(Citated with approval in Pederson vs. Del. L. & W. R. Co., 229 U. S. 146, 57 L. Ed. 1125, 1128).

The operator in the Horton case was riding from his home to his work on a hand car furnished by the railroad for that purpose.

(f) A man going after a drinking cup for the use of the engine crew on an interstate trip.

B. & O. R. R. Co. vs. Whitacre, 124 Md. 411, 427 (affirmed in 242 U. S. 169, 61 L. Ed. 228).

(g) The reasoning of various cases cited in respondent's brief filed with this motion, in which the employees were held to be engaged in interstate commerce.

And with special reference to that part of the motion asking that the case be placed on the Summary Docket, this respondent says that he is seventy years old, and that more than three years have intervened since he was injured on December 23rd, 1915, since which time he has been unable to work, and except for the help of his neighbors has been in practically destitute circumstances, that his general health is bad and that should he die before the final determination of this case by this Honorable Court, he and those dependent upon him will, in case it should be found that the respondent was not engaged in interstate commerce, be deprived of the benefit of the Workmen's Compensation law of the State of Maryland.

Respectfully submitted,

T. ALAN GOLDSBOROUGH,

Attorney for Respondent.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, Prosecutor, vs. ALFRED H. SMITH, Respondent.	IN THE SUPREME COURT OF THE UNITED STATES. October Term, 1918.

BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO AFFIRM THE JUDGMENT OF THE COURT OF APPEALS OF MARYLAND OR IN LIEU THEREOF TO ORDER THE CAUSE PLACED ON THE SUMMARY DOCKET.

FACTS BEARING UPON THE RELATION OF THE RESPONDENT TO INTERSTATE COMMERCE.

The prosecutor is a common carrier with a main line from Philadelphia, Pennsylvania, to Cape Charles, Virginia, running through the States of Pennsylvania, Delaware, Maryland and Virginia. It has a branch line known as the Oxford Branch, running from Clayton, Delaware, to Oxford, Maryland, a distance of fifty-four miles. Fifteen miles of the road is in Delaware, and the remainder, some thirty-nine miles, in Maryland. Easton is a station in Maryland on the Oxford Branch. The respondent was employed by the prosecutor as a carpenter laborer and was engaged with a gang of bridge carpenters who worked all over the lines in the different States wherever bridges or bridge abutments needed repair, over which ran the prosecutor's trains.

Record, page 50-51-52-53

"Q. What was his employment during the length of time? A. He was a carpenter laborer but ('before' in the record by mistake) he done the cooking.

Q. He did cook? A. Yes, sir.

Mr. Goldsborough:

Q. He was employed as a carpenter laborer? A. Yes, sir. That's the way we have them on our roll.

Mr. Lewis:

Q. So there may be no misunderstanding, what is a carpenter laborer? A. He's a man that does labor work; works with the carpenters. The rate of his pay causes him to be rated as a laborer; a low rate of pay.

Q. Do you mean he worked as a carpenter? A. No, sir; he worked with them.

Q. But not as a carpenter. A. "No, sir."

Record page 54+55

"Cross Examination by Mr. Goldsborough.

Q. Mr. Larrimore, in speaking of bridge laborers, as I understand your testimony he was a bridge laborer or an assistant to bridge carpenters? A. No, he's a man unskilled in carpentering. The reason he is called a laborer is on account of the rate of pay he receives. We place them on the roll as carpenter laborers. That means they work with the carpenters.

Q. That means he worked with the carpenters? A. Yes, in that respect; he never was engaged in the work.

Q. He never was a carpenter? A. No, sir.

Q. The carpenters he was engaged to work with were bridge carpenters? A. We're called bridge carpenters, but our gang done principally bridge work.

Q. As I understand you it was principally bridge work your gang did? A. Yes, sir.

Q. Those were bridges over which trains run between the states of Maryland and Delaware? A. Yes, sir."

A car in which the gang ate, slept, and lived went back and forth between the States with the bridge gang. On the twenty-third of December, 1915, the car, generally called a camp car, was on a siding below Easton, the gang being engaged in repairing bridge abutments on a bridge below Easton over which ran the interstate passenger and freight trains of the prosecutor. As indicated above, these trains were *all either trains which were going from the State of Maryland into the State of Delaware or had come from the State of Delaware into the State of Maryland.* The duties of the respondent and those in which he had been engaged along with the

bridge gang for nearly twenty-seven years (Record page 78).

("Q. At the time of your injury at Easton how long had you been in the service of the company? A. Twenty-six years, six months and three days.

Q. You were sixty-seven—sixty-eight at he time of the injury? A.—I was in my 68th.

Q. You would be pensioned at seventy wouldn't you? A. Yes, sir.")

were principally to take care of the camp car, to keep it clean, attend to the beds, and prepare and cook the meals for the gang, including himself. The men, including the respondent, and the boss of the gang, who was also the respondent's boss, bought their food together, the camp car, as above indicated, being the place indicated by the prosecutor in which the respondent should perform his duties. On the above date a freight train on its run from Oxford to Clayton carrying interstate freight, stopped at Easton to pick up a freight car being loaded at the Easton Commission Company's warehouse. The engineer, with the engine and tender, went into the warehouse siding, pulled out the car, pulled the car on the main track and then made what is called a flying switch, that is, gave the car ahead of the engine impetus so that it would go back and couple with the balance of the freight train while the engine itself cut loose and went back on the siding on which was located the camp car. The engineer knew the camp car was on the siding and its location, which was one hundred and fifty-four feet back from what is known as the "clear" of the switch. The record discloses that the engineer negligently ran the engine with great violence against the car to which the camp car was coupled, partly demolishing one end of it. The collision caused the cars, of which the camp car was one, to move south, when they ran into other cars. The plaintiff describes the accident as follows (Record page 17):

"Q. Now Mr. Smith, what were you doing on the

23rd day of December, 1913? A. I was getting dinner. I was cooking a big turkey, and a freight came along between eight and nine o'clock. They always gave me warning before when they were coming in on that track. I had been to the stove to baste the turkey. I had two kettles of boiling water for the potatoes I just started after them when they struck me. I was knocked about ten feet and bruised my chin.

The witness continuing further states: "When they struck the other two cars before I could recover they knocked me over a chair and my shoulder struck here (indicating). I had no use of my shoulder since. If I have to 'bust' any wood I have to put the axe here (Indicating) I can't cut wood. My whole dependence is on the R. R. Co., with a sister and niece."

ARGUMENT

1.

(a) The respondent was performing his regular duties for a common carrier engaged in interstate commerce.

(b) His regular duties required his presence in a car located on tracks devoted exclusively to the passage of trains engaged in interstate commerce, and at the nearest possible point to the place where the bridge carpenters were engaged, so as to facilitate the work.

(c) The place designated by the prosecutor for the appellee to work made his employment come within the class known as "hazardous."

> "In the case of clerks in the accounting department, although they be engaged in keeping the accounts of interstate shipments, it is difficult to see how they are engaged in interstate commerce as used in this statute, for their work is not of a hazardous character, such as it seems that Congress had in mind when it enacted this statute. And this is also true of ticket sellers; but not station agents when handling interstate traffic."

Thornton, Federal, and Safety Appliance Acts (1916) P. 94.

(d) The place assigned to the respondent by the prosecutor for the performance of his duties was such as to render him constantly liable to injury by interstate trains and, as a matter of fact, he was injured by an interstate train, which are very significant facts;

(Lamphere vs. Oregon R. & Nav. Co. 116 C. C. A. 156, 196 Fed. 336, 47 L. R. A. (N. S.) 1. On page 2 the Court says:

> "He was on the premises of the railroad company and in the discharge of his duties when he met his death, and the train which struck him and caused his death was engaged in interstate commerce, and belonged to the same railroad company."

In Horton vs. Oregon-Wash. R. & Nav. Co., 72 Wash., 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8:

> "An operator of a railroad pumping plant which furnishes water for interstate and intrastate engines is employed in interstate commerce while riding from his home to his work on a hand car furnished by the company for that purpose, so as to be within the operation of the Federal Employer's Liability Act if injured by those, during that time, in charge of an interstate train."

In Central R. Co. vs. Colasurdo 113 C. C. A. 379, 192 Fed. 901, the Court said:

> "The car which struck the plaintiff was employed in interstate commerce."

Zikos vs. R. & Nav. Co. (C. C.) 179 Fed. 893.) for while it is not necessary that the servant whose negligence caused the injury, shall be engaged in interstate commerce,

> (Pederson vs. Del., L. & W. R. Co., 229 U. S., 146, 151, 57 L. Ed. 1125, 1127.)

a most diligent search has failed to reveal a single instance where an employee, in the performance of his du-

ties, which duties required his presence on the tracks of an interstate road, was injured through the negligence of a fellow servant, by a train of his employer engaged in interstate commerce, was not unhesitatingly held to have been engaged in interstate commerce.

(e) The respondent was engaged by the prosecutor as a part of the bridge gang and designated as a car-carpenter's helper and had a common boss with the rest of the men.

(f) The respondent's duties were as necessary to interstate commerce as the work of the rest of the gang, the division of labor being simply a matter of economic expediency.

(g) The bridge carpenters, with whom the respondent worked and for whom he was cooking dinner at the time of the accident, were engaged in interstate commerce.

Pederson vs. Del. L. & W. R. R. Co. supra, 229 U. S. 146, 57 L. Ed. 1125.
Lombardo vs. Boston, etc., R. Co. 223 Fed. 427.
Hardwich vs. Wabash R. Co. 181 Mo. A. 156, 168 S. W. 328.
San Pedro L. A. & S. L. R. Co. vs. Davide, 210 Fed. 870, 127 C. C. A. 454.
12 C. J. 47.
Note to Seaboard A. L. Co. vs. Horton, 1915 C. (L. R. A.) 1, 62.

2.

Scope of The Act.

The tendency of the Courts is to construe the statute liberally as being remedial in character, although it is in derogation of the common law.

Annotation to Seaboard A. L. R. Co. vs. Horton (L. R. A.) 1915 C, 1, 48.

"Congress may legislate about the agents and instruments of interstate commerce, and about the condi-

tions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair Legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act."

2nd Employer's Liability Cases.
(Mondou vs. N. Y., N. H. & Hartford R. Co.)
223 U. S. 6.
56 L. Ed. 329.
38 L. R. A. (N. S.) 44, 53.

Quoting from a case cited with approval by the Supreme Court of the United States in Pederson vs. Del. L. & W. R. Co., 229 U. S. 146, 153, 57 L. Ed. 1125, 1128:

"The sole question presented for our consideration is this: Was the decedent employed by the defendant in interstate commerce at the time of his death, so as to enable his representative to invoke the benefit of this act? The earlier act of 1906 (act June 11, 1906, Chap. 3073, 34 Stat. at L. 232, U. S. Comp. Stat. Supp. 1911, p. 1316) was in the Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. Rep. 141, held unconstitutional as exceeding the power of Congress under the commerce clause of the Constitution, in that it imposed a liability, as against all common carriers engaged in interstate commerce, in favor of any of their employees without restriction, and whether their employment did or did not pertain to interstate commerce. In those cases, however, all the justices concurred in recognizing the power of Congress to regulate the relation of master and servant by regulations confined to interstate commerce and services connected therewith. The act of 1908, above quoted, was passed to conform to that decision, and should therefore be construed as including within the term 'any person suffering injury while he is employed by such carrier in such commerce', *every person who could be so included within the purview of the constitutional power. The 'act meant to include everybody whom Congress could include.'* Colasurdo v. Central R. Co. (C. C.) 180 Fed. 832.

That such was the purpose and intent of the second act seems to be assumed by the Supreme Court of the United States in an opinion holding the act constitutional. Second Employers' Liability cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. The inquiry is thus narrowed to the concrete question: *Had Congress the constitutional power to enact a law regulating the relation between a common carrier engaged in interstate commerce and its servant who is employed in pumping water used by its engines both for interstate and intrastate commerce? If Congress had this power, then we must assume that it intended to exercise it in passing the present act.*" (Italics mine.)

Horton vs. Oregon-Wash. R. & Nav. Co., 72 Wash., 503, 132 P. 897, 47 L. R. A. (N. S.) 8, 10.

3

The case at bar seems to parallel in principle the following cases decided by the Supreme Court of the United States in which the employee was held to be engaged in interstate commerce.

In the Pederson case, supra, on page 1128 of the L. Ed. The Supreme Court says:

"The point is made that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. *In other words it was a minor task which was essentially a part of the larger one, as in the case when an engineer takes his engine from the round-house to the track on which are the cars he is to haul in interstate commerce.* See Lamphere vs. Oregon R. & Nav. Co.—L. R. A. (N. S.)—, 116 C. C. A. 156, 196 Fed. 336; Horton vs. Oregon—Washington R. & Nav. Co. 72 Wash. 503,

130 Pac. 897; Johnson vs. Southern P. Co. 196 U. S. 1, 21, 49 L. ed. 363, 371, 25 Sup. Ct. Rep. 158." (Italics mine.)

In St. Louis S. F. & T. R. Co. vs. Seale, 229 U. S. 156, 159, 160; 57 L. Ed. 1129, 1134, the court states the facts as follows:

> "The deceased was employed by the defendant as a yard clerk in that yard, and his principal duties were those of examining incoming and outgoing trains and making a record of the numbers and initials on the cars, of inspecting and making a record of the seals on the car doors, of checking the cars with the conductors' lists, and of putting cards or labels on the cars to guide switching crews in breaking up incoming, and making up outgoing trains. His duties related to both intrastate and interstate traffic, and at the time of his injury and death he was on his way through the yard to one of the tracks therein to meet an incoming freight train from Madill, Oklahoma, composed of several cars, ten of which were loaded with freight. The purpose with which he was going to the train was that of taking the numbers of the cars and otherwise performing his duties in respect of them. While so engaged he was struck and fatally injured by a switch engine which, it is claimed, was being negligently operated by other employees in the yard."

From the case of N. C. Rrd. Co. vs. Zachary, 232 U. S. 248, 260, 58 L. Ed. 591, 596, Ann. Cas. 1914 C., 159;

> "It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still in futuro. It seems to us, however, that his acts in inspecting, oiling, firing, and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce and the circumstance that the interstate freight cars had not as yet been coupled up is legally insignificant. See Pederson vs. Delaware, L. & W.

R. Co. 229 U. S. 146, 151, 57 L. Ed. 1125, 1127, 33 Sup. Ct. Rep. 648; St. Louis, S. F. & T. R. Co. vs. Seale 229 U. S. 156, 161, 57 L. Ed. 1129, 1134, 33 Sup. Ct. Rep. 651.

Again it is said that because deceased had left his engine and was going to his boarding house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, *and that he had not gone beyond the limits of the railroad yard when he was struck.* There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine. See Missouri, K. & T. R. Co. vs. United States, 231 U. S. 112, 119, ante, 144, 147, 34 Sup. Ct. Rep. 26." (Italics mine.)

A brakeman of a freight train, that was being prepared to engage in interstate commerce, who left the train and went across the railroad yard for a drinking cup, for the engine crew on the trip, is engaged in interstate commerce within the meaning of the Act.

"In the N. C. R. R. Co. vs. Zachary, 232 U. S. 248, it was held that the acts of an employee in preparing an engine for a trip to move freight in interstate commerce, although done prior to the actual coupling-up of the interstate cars, are acts done while engaged in interstate commerce. In this latter case the party for whose death the action was brought was a fireman on a locomotive of the Southern Railway, he had prepared his engine for the trip and was crossing the railroad yard from his engine to go to his boarding-house; and had passed behind one locomotive, when he was run down by a switching engine on an adjoining track. Certainly the act of the

fireman in going to his boarding-house was no more an act connected with interstate commerce than was the act of Whitacre in hunting for a tool boy in order to obtain a tin cup for the use of the crew on its trip."

B. & O. R. R. Co. vs. Whitacre, 124, Md. 411, 427. (Affirmed in 242 U. S. 169, 61 L. Ed. 228.)

In Erie R. Co. vs. Winfield, 244 U. S. 170, 173, 61 L. Ed. 1057, 1065; the Court said:

"The second question (was plaintiff engaged in interstate commerce) must be given an affirmative answer. *In leaving the carrier's yard* at the close of his day's work the deceased was but discharging a duty of his employment. See North Carolina R. Co. vs. Zachary, 232 U. S. 248, 260, 58 L. Ed. 591, 34 Sup. Ct. Rep. 305, 9 N. C. C. A. 109, Ann. Cas. 1914 C. 159. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work, and partook of the character of that work as a whole, for it was not more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so, when he was *leaving the yard at the time of the injury*, his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is for present purposes, of no importance." (Italics mine.)

In N. Y. Cent. & H. R. R. Co. vs. Carr, 238 U. S. 260, 59 L. Ed. 1298, 1299, 1300, the plaintiff was a brakeman on a "pick-up" train running between points in the same State, but containing some cars loaded with interstate freight; he was injured while atempting, in the course of his employment, to set the brakes of an intrastate car, which had been cut out of the train and backed into a siding. The Court says:

"The railroad company insists that when the two cars were cut out of the train and backed into a siding, they lost their interstate character, so that Carr

while working thereon was engaged in intrastate commerce and not entitled to recover under the Federal employers' liability act. The scope of that statute is so broad that it covers a vast field about which there can be no discussion. But owing to the fact that during the same day, railroad employees often and rapidly pass, from one class of employment to another, the courts are constantly called upon to decide those close questions where it is difficult to define the line which divides the state from the interstate business. The present case is an instance of that kind; and many arguments have been advanced by the railway company to support its contention that, as those two cars had been cut out of the interstate train and put upon a siding, it could not be said that one working thereon was employed in interstate commerce. But the matter is not to be decided by considering the physical position of the employee at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty, or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefits of the Federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars. St. Louis, S. F. & T. R. Co. vs. Seale, 229 U. S. 156, 57 L. Ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914 C., 156; North Carolina R. Co. vs. Zachary, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cass. 1914 C., 159. This case is within the principle of those two decisions.

The plaintiff was a brakeman on an interstate train. As such, it was a part of his duty to assist in the switching, backing and uncoupling of the two cars so that they might be left on a siding in order that the interstate train might proceed on its journey. In performing this duty it was necessary to set the brake of the car still attached to the interstate engine, so that, when uncoupled, the latter might return to the interstate train, and proceed with it, with Carr and the other interstate employ-

ees, on its interstate journey.

The case is entirely different from that of Illinois C. R. Co. vs. Behrens, 233 U. S. 473, 58 L. Ed., 1051, 34 Sup. Ct. Rep. 646,Ann. Cas.1914 C., 163, for there the train of empty cars was running between two points in the same state. The fact that they might soon thereafter be used in interstate business did not affect their intrastate status at the time of the injury; for, if the fact that a car had been recently engaged in interstate commerce, or was expected soon to be used in such commerce, brought them within the class of interstate vehicles, the effect would be to give every car on the line that character.

Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employee is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof. Under these principles the plaintiff is to be treated as having been employed in interstate commerce at the time of his injury, and the judgment in his favor must be affirmed."

In Louisville & Nashville R. Co. vs. Parker, 242 U. S. 13, 14, 15, 61 L. Ed. 119, 120, 121:

"The business upon which the deceased was engaged at the moment was transferring an empty car from one switch track to another. *This car was not moving in interstate commerce, and that fact was treated as conclusive by the court of appeals. In this the court was in error, for if, as there was strong evidence to show, and as the court seemed to assume, this movement was simply for the purpose of reaching and moving an interstate car, the purpose would control and the business would be interstate.* The difference is marked between a mere expectation that the act done would be followed by other work of a different character, as in Illinois C. R. Co. vs. Behrens, 233 U. S. 473, 478, 58 L. Ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914 C., 163,

10 N. C. C. A. 153, and doing the act for the purpose of furthering the later work. See New York C. & H. R. R. Co. vs. Carr, 233 U. S. 260, 263, 59 L. Ed. 1298, 35 Sup. Rep. 780, 9 N. C. C. A. 1; Pennsylvania Co. V. Donat, 239 U. S. 50, 60 L. Ed. 139, 36 Sup. Ct. Rep. 4; Kalem Co. vs. Harper Bros, 222 U. S. 55, 62, 63, 56 L. Ed. 92, 95, 96, 32 Sup. Ct. Rep. 20, Ann. Cas. 1913 A., 1285." (Italics mine.)

In a late case decided by the Supreme Court of the United States, the plaintiff was a car inspector in the defendant's yards, a collission occurred, a fellow servant was pinned under a car, and in obedience to the printed rules of the company, and also orders of a superior employee, the plaintiff went to get a jack to assist in raising the wrecked car so as to extricate O'Berry (the fellow servant) and clear the tracks of the wreckage; while on his way he stumbled over some clinkers and crossties, fell, and was seriously injured. The Court said:

> The Court (a lower Court) held that although plaintiff's primary object may have been to rescue his fellow employee, his act nevertheless was the first step in clearing the obstruction from the tracks, to the end that the remaining cars for train No. 75 might be hauled over them; that his work facilitated interstate transportation on the railroad, and that consequently he was engaged in interstate commerce when injured.
>
> We concur in this view. From the facts found, it is plain that the object of clearing the tracks entered inseparably into the purpose of jacking up the car, and gave to the operation the character of interstate commerce. The case is controlled by Pederson vs. Delaware L. & W. R. Co. 229 U. S. 146, 152, 57 L. Ed. 1125, 1128, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914 C., 153, 3 N. C. C. A. 779; New York C. & H. R. R. Co. vs. Carr, 238 U. S. 260, 263, 59 L. Ed. 1298, 1299, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1; Pennsylvania Co. vs. Donat, 239 U. S. 50, 60 L. Ed. 139, 36 Sup. Ct. Rep. 4; Louisville & N. R. Co. V. Parker, 242 U. S. 13, ante, 119, 37 Sup. Ct. Rep. 4. Pederson vs. Delaware, L. & W. R. R. Co. supra, holds that a workman

employed in maintaining interstate tracks in proper condition while they are in use is employed in interstate commerce; the other cases are to the effect that preparatory movements in aid of interstate transportation are a part of such commerce within the meaning of the act.

Of course we attribute no significance to the fact that plaintiff had been engaged in inspecting interstate cars before he was called aside by the occurrence of the collission. Illinois C. R. Co. vs. Behrens 233 U.S. 473, 478, 58 L. Ed. 1051, 1055, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914 C., 163, 10 N. C. C. A. 153; Erie R. Co. vs. Welsh, 242 U. S. 303, 306, ante, 319, 324, 37 Sup. Ct. Rep. 116."

Southern R. Co. vs. Puckett, 244 U. S. 571, 573, 574, 61 L. Ed. 1321, 1324, 1325.

The case at bar would parallel the New York C. R. Co. vs. White, 243 U. S. 188, 61 L. Ed. 667 if that were not a new construction case, which takes it out of the Federal Act.

(Pederson vs. Del. L. & W. Rrd. Co. supra, page 1128 of L. Ed. 12 C. J. page 48 and note 41, and 41 A. and cases there cited . Note to Seaboard A. L. R. Co. vs. Horton, 1915, C. (L. R. A.) 1, 63.)

In this case a night watchman in the employ of a railway company, injured while in the performance of his duties to guard tools and materials intended to be used in the construction of a *new* railway station and *new* tracks, was held not then engaged in interstate commerce within the meaning of the Federal Liability Act, although such station and tracks were designed for use, when finished, in interstate commerce, the inference being that if he had been guarding tools used in *repairing* a railway station and tracks then in use in interstate commerce he would have been engaged in interstate commerce within the meaning of the Act.

4.

The authorities usually relied on to take a case out of the Federal act are:

Minn. & St. L. R. Co. vs. Winters, 242 U. S. 353, 61 L. Ed. 358.

Chicago B. & A. Co. vs. Harrington, 241 U. S. 177, 60 L. Ed. 941.

Shanks vs. Del. L. & W. R. Co., 239 U. S. 556, 60 L. Ed. 436, 1916 C. (L. R. A.,) page 797.

Del. L. & W. R. Co. vs. Yurkonis 238 U. S. 439, 59 L. Ed. 1397.

Ill. C. Rrd. Co. vs. Behrens 238 U. S. 473, 58 L. Ed. 1051, Ann. Cas. 1914, C., 163.

In the winters case a machinist's helper was injured while repairing in a roundhouse an engine which had been used in both interstate and intrastate commerce and which was used in the same way after the accident. The Court says on page 359 and 360 of the L. Ed.:

> "This is not like the matter of repairs upon a road permanently devoted to commerce among the states" * * * * * * "It was not interupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or *confined to Iowa*, as it should happen. (Italics mine.)

In the Harrington case the deceased was a member of a switching crew which did not work outside of the State. The gang was engaged at the time of the accident in switching coal belonging to the defendant which had been standing on a storage track for sometime, to the coal shed where it was to be placed in bins or chutes and supplied, as needed, to locomotives of all classes, "some of which were engaged or about to be engaged in interstate and others in intrastate traffic" * * * * 'With the movement of the coal to the storage tracks, however, we are not concerned; that movement had long since ended, as it is admitted that the coal was owned by the company, and 'had been in storage in its storage tracks for a week or more prior to the time it was being switched into the coal chutes on the morning of the accident.' "

In the Shanks case the Court, on page 799 of the L. Ed., referring to the plaintiff, says:

"Usually his work consisted in repairing certain parts of locomotives, but on the day of the injury he was engaged solely in taking down and putting into a new location an overhead countershaft—a heavy shop fixture—through which power was communicated to some of the machinery used in the repair work."

In theYurkonis case the plaintiff was mining coal in the colliery of the defendant. The Court says, page 1400 of the L. Ed. :

"The averments of the complaint as to the manner of the receiving of the injury by plaintiff showed conclusively that it did not occur in interstate commerce. The mere fact that the coal might be or was intended to be used in the conduct of interstate commerce after the same was mined and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce. The injury happening when plaintiff was preparing to mine the coal was not an injury happening in interstate commerce, and the defendant was not then carrying on interstate commerce,—facts essential to recovery under the employer's liability act."

In the Behrens case a member of a switching crew, whose general work extended both to interstate and intrastate traffic, was engaged in hauling a train or drag of cars, all loaded with intrastate freight, from one part of a city to another.

Had the respondent in the case at bar been employed to prepare the meals for the company's bridge carpenters at some place removed from the prosecutor's interstate lines, which meals were carried by another servant of the prosecutor to the camp car, or had there been two gangs of men for whom to prepare meals, one gang employed in interstate commerce and the other gang ememployed in intrastate commerce, it not appearing from the evidence for which gang the respondent was preparing dinner at the time of the accident, the case at bar

might parallel these cases.

5.

Cases holding the servant within the act decided by Federal Courts other than the Supreme Court of the United States and by State Courts. Some of these cases have been cited with approval by the Supreme Court—none have been reversed, or disapproved of, by the Supreme Court.

A railroad fireman, who, in accordance with his contract, was obeying an order to report at a station for transportation to a certain town, there to relieve the crew of an interstate train, is employed in interstate commerce within the meaning of the Federal Employer's Liability Act, and the railroad company is liable for his negligent killing by fellow servants also engaged in interstate commerce, while he was crossing the track at the station where he was ordered to report.

Lamphere vs. Oregon R. & Nav. Co., 116 C. C. A. 156, 196 Fed. 336, 47 L. R. A. (N. S.) 1.

(Cited with approval in Pederson vs. Del. L. & W. R. Co. 229 U. S. 146, 57 L. Ed. 1125, 1128.)

An operator of a railroad pumping plant which furnishes water for interstate engines, is employed in interstate commerce while riding from his home to his work on a handcar, furnished by the company for that purpose, so as to be within the operation of the Federal Employers' Liability Act, if injured by those, during that time, in charge of an interstate train.

Horton, etc., vs. Oregon W. R. & Nav. Co., 72 Wash. 503, 132 P. 897, 47 L. R. A. (N. S.) 8.

(Cited with approval in Pederson vs. Del. L. & W. R. Co. supra, 229 U. S. 146, 57 L. Ed. 1125, 1128.)

A fireman on a switch engine, in moving cars of water or coal over the line of his employer, an interstate railroad, for use in its own engines, is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act.

Barker vs. Kan. City M. & O. Co., 88 Kan. 767, 129 P. 1151, 43 L. R. A. (N. S.) 1121.

A member of a switching crew injured while attempting to move on a switch a tank car loaded with oil for engines running between states, as well as for his own, which is engaged in moving cars between switches and the main track where they are left and taken up by interstate trains for transportation into other states as well as to points within the state where he is located, is, although his duties are all performed in one state, employed in interstate commerce within the operation of the Federal Employers' Liability Act.

Montgomery vs. Southern P. Co. 64 Or. 597, 131 P. 507, 47 L. R. A. (N. S.) 13.

A boiler makers' helper engaged in repairing a locomotive regularly employed in interstate transportation and which was destined to return thereto upon completion of repairs, is employed in interstate commerce and within the protection of the Federal Employers' Liability Act.

Law vs. Ill. C. R. Co. ,126 C. C. A. 27, 208 Fed. 869, 1915 C. (L. R. A.) 17. (This case is distinguished from Minn. & St. L. R. Co. vs. Winters, supra, because the locomotive had been and was to be engaged exclusively in interstate commerce.)

Station agents when handling interstate traffic.
Thornton (1916) Federal and Safety Appliance Acts, page 94.

A person injured while engaged in the work of installing a new automatic block system is employed in interstate commerce at the time of his injury.
Saunders vs. Southern R. Co. 167 N. C. 375, 83 S. E. 573.

An employee engaged in building a new office in an old train shed.
Eng. vs. Southern P. Co. 210 Fed. 92.

A truckman employed by a railroad company to wheel interstate freight from a warehouse into a car to be transported in interstate commerce is engaged in interstate commerce.

Ill. C. R. Co. vs. Porter, 125 C. C. A. 55, 207 Fed. 311.

One employed in cleaning out ash pits into which ashes from both interstate and intrastate locomotives are dumped is engaged in interstate commerce.

Cinn. N. O. & T. R. Co. vs. Clark, 169 Ky. 662, 185 S. W. 94.

Gryboski vs. Erie R. Co. 88 N. J. Law 1, 95 A. 764.

Signal man operating electric signals which control the operation of interstate trains.

Cinn. etc., R. Co. vs. Bonham, 130 Tenn. 435, 171 S. W. 79.

Hostler's helper engaged in coaling engine then being prepared for interstate service.

Armbruster vs. Chicago R. Co. 166 Iowa, 155, 147 N. W. 337.

Carrying material away from place where repair work has been done.

Philadelphia etc., R. Co., vs. McConnell, 228 Fed. 263, 142 C. C. A. 555.

"A person engaged in repairing the tracks of a railroad company is engaged in interstate commerce, even though the repairs consist in shoveling the dirt from between the ties under the rails of the tracks used to carry interstate trains."

Lombardo vs. Boston, etc., R. Co. 223 Fed. 427, 432.

An employee returning to camp on a hand car from his work, which was ballisting the main track of a railroad which carried freight and passengers between different States. "Although at the time when he was injured he was returning to the camp at the conclusion

of his day's labor he was doing so at the direction of his employer. He got upon the hand car upon which he rode under the order of the section foreman, to take it back to a certain designated place on the line of the road."

San Pedro, L. A. & S. L. R. Co. vs. Davide, 210 Fed. 870, 127 C. C. A. 454.

Section man engaged in sweeping snow from the switch connected with the main track near to a station.

Hardwich vs. Wabash R. Co. 181 Mo. A. 156, 168 S. W. 328.

An express messenger on an interstate train in charge of the electric plant in the express car, the plaintiff was held to be engaged in interstate commerce, although the Court says:

"There is no evidence that the train had, at the time of the injury, interstate freight or passengers, that the Express Company then had interstate shipments, or that the train was carrying interstate passengers, whom Wessler could be serving by turning on, as he said he was then doing, the electric current to illuminate the train. On the other hand, there is no testimony that there was no interstate freight, express shipments, or passengers."

Wessler vs. Great N. R. Co. 91 Wash. 234, 155 P. 1063, 157 P. 46.

Where an employer who was engaged in relaying rails on the main track, forming one of a repair crew, was injured while asleep at night in a shanty car in a train on a side track, a car provided by the railroad company for the crew, it was held that he came within the Federal Act.

Sanders vs. Charleston & W. C. R. R. Co., 96 S. C. 50, 81 S. E. 283.

A porter preparing ice to put in a water cooler on the train for the use of interstate passengers. "He

(plaintiff) alleged that while in the employ of said receiver in the city of Fort Worth he was attempting to lift a block of ice, weighing about one hundred pounds from an ice box, for the purpose of carrying same to passenger cars and that while engaged in the effort he slipped and was injured by a falling block of ice" • • • • that it was a part of his duty "to go to the roundhouse, get ice from the boxes furnished for that purpose, place it on a table, and saw in into four pieces, put the pieces in a wheel-barrow, convey them to passenger coaches, and put them in water coolers."

Quoting from the Court's opinion:

"Appellee's employment had direct relation to the commerce, to-wit: the two interstate passengers which the train in question transported. The service performed directly contributed to the comfort and necessity, not only of the local, but of the interstate passengers."

Freeman vs. Powell (Tex. Civ. A.) 133 S. W. 1033, Thornton, Federal and Safety Appliance Acts, (1916) p. 96.

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One case from the United States Circuit Court of Appeals, and two cases from the Supreme Court of the United States, which seem to be in point, not only in principle, but in identity (with the case at bar) of the kind of work embraced within the scope of the Federal Employers' Liability Act;

A pullman porter is, as to the railroad, engaged in interstate commerce, when he is an employee of the Railroad Company.

Oliver vs. N. P. R. Co., 196 Fed. 432.
Thornton, Federal and Safety Appliance Acts, (1916) p. 127, note 2.

This would be the ruling of the Supreme Court were a case like the Oliver case presented. In the case of Robinson vs. B. & O. R. Co. 237, U. S. 84, 59. L. Ed. 849,

recovery was denied because of the contract between Robinson, a pullman porter, and the railroad company exempting it from liability. Robinson attempted to invoke the Federal Employers' Liability Act which says that such a contract shall be void. It seemed to have been conceded that if Robinson had been a servant of the railroad company he would have been engaged in interstate commerce within the meaning of the act, but the Supreme Court held he was not an employee of the railroad company. On page 852 of the L. Ed. The Supreme Court says:

> "The contract between the Pullman Company and the Railroad Company was introduced in evidence. Without attempting to state its details, it is sufficient to say that the case was not one of co-proprietorship. (See Oliver vs. Northern P. R. Co., 196 Fed. 432, 435.")

In Johnson vs. Southern P. Co. 106 U. S. 1, 21, 49 L. Ed. 363, 371, the Supreme Court held that a dining car was engaged in interstate commerce:

> "Another ground on which the decision of the circuit court of appeals was rested remains to be noticed. That court held by a majority that, as the dining car was empty and had not actually entered upon its trip, it was not used in moving interstate traffic, and hence was not within the act. The dining car had been constantly used for several years to furnish meals to passengers between San Francisco and Ogden, and for no other purpose. On the day of the accident the eastbound train was so late that it was found that the car could not reach Ogden in time to return on the next westbound train according to intention, and it was therefore dropped off at Promontory, to be picked up by that train as it came along that evening." • • •
>
> "Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up

for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law."

This case is cited repeatedly in cases in which the Federal Employers' Liability Act has been invoked.

B. & O. R. R. Co vs. Darr, 204 Fed. 751, 47 L. R. A. 4, 6.

Pederson vs. Del. L. & W. R. Co. 229 U. S. 146, 57 L. Ed. 1125.

St. Louis S. F. & T. R. Co. vs. Seale, 229 U. S. 156, 57 L. Ed. 1129.

N. C. Rrd. Co. vs. Zachary 232 U. S. 248, 58 L. Ed. 591.

If a dining car, attached to an interstate train, is engaged in interstate commerce, then clearly a waiter or *cook* on a dining car, being the employees, the performance of whose duties make it possible for the dining car to perform the only functions which it is to perform, are engaged in interstate commerce. I have found it impossible to distinguish between the case of a cook on a dining car and that of the respondent in the case at bar.

Respectfully submitted,

T. ALAN GOLDSBOROUGH,

Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 472.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, PETITIONER,

vs.

ALFRED H. SMITH.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

OPPOSITION TO MOTION TO AFFIRM JUDGMENT OF THE COURT OF APPEALS OF MARYLAND.

In opposing motion of respondent to affirm the judgment of the Court of Appeals of Maryland in this case, petitioner respectfully refers to its statement of case, its claim of error in matter of law and its brief citing cases in support of such claim, sub-

mitted to this honorable Court October 7, 1918, in connection with its petition for certiorari.

As that petition was granted and writ of certiorari ordered to issue on October 21, 1918, after such consideration of the questions involved as the Court deemed necessary for their full appreciation, it can hardly be manifest that the writ was either asked for or granted "for delay only," or "that the questions on which the decision of the cause depend are so frivolous as not to need further argument" (Rules of Practice, Supreme Court U. S., Sec. 5, Rule No. 6, Motions).

As indicated in the petition for certiorari, the principal question on which the decision of the cause depends, is whether the plaintiff, who was employed and paid by your petitioner to clean a certain "camp car," and therein to cook foodstuffs purchased by him at the individual expense of himself and associates, members of a "bridge gang" likewise in the employ of petitioner, was at the time of receiving the injuries of which he complains "performing any work so closely connected 'with' interstate commerce 'as to be a part of it,' " the specific work upon which he was then engaged being the cooking of dinner for the bridge carpenters, who were engaged at a distance from the "camp car" in repairing a bridge forming part of petitioner's line of railroad used in the moving of both interstate and intrastate commerce.

As heretofore indicated, the contention of your petitioner is that the work upon which plaintiff Smith was then and for at least three weeks previously had been engaged, viz., cleaning the camp car and preparing meals for his associates and co-employees, the bridge carpenters, was "work being done independently of the interstate commerce in which" your petitioner was engaged, and its performance or not was "matter of indifference, so far as that commerce was concerned."

Erie R. R. Co. *vs.* Welsh, 242 U. S., 303.
Illinois Central R. R. Co. *vs.* Behrens, 233 U. S., 473.

As to so much of respondent's motion as asks summary affirmance of the judgment of the Court of Appeals of Maryland without further argument, it would seem that nothing more need be said.

The questions for decision, though important and of public interest, do not call for extended discussion. Petitioner does not object, but, on the contrary, readily assents, that this cause may be transferred to the summary docket and assigned for hearing at such day as may best suit the convenience of the Court.

FREDERIC D. McKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for Plaintiff.

February 10, 1919.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 1081.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, PETITIONER,

vs.

ALFRED H. SMITH.

ON PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

MOTION FOR STAY OF EXECUTION PENDING ACTION ON PETITION FOR CERTIORARI.

Now comes petitioner, Philadelphia, Baltimore and Washington Railroad Company, by its attorneys, and respectfully moves this Honorable Court to direct stay of execution upon the judgment of the Circuit Court for Caroline County, Maryland, lately affirmed by the Court of Appeals of the State of Maryland, and complained of and sought to be brought under review by this Honorable Court by means of the petition for certiorari heretofore filed and now pending herein, and as ground for such motion respectfully shows:

1. Judgment against petitioner Philadelphia, Baltimore and Washington Railroad Company and in favor of respond-

ent Alfred H. Smith, for the sum of $4,000 was entered in the Circuit Court for Caroline County, Maryland, on April 16, 1917.

Appeal to the Court of Appeals of Maryland was perfected and execution of said judgment stayed by the filing of an approved bond on June 8, 1917 (R., 2). Said bond is still in force.

2. On hearing in due course the Court of Appeals of Maryland affirmed with costs said judgment of the Circuit Court for Caroline County and issued remittitur.

3. To review the judgment of said Court of Appeals of Maryland, which rests upon manifest error in the construction and application in the circumstances of the provisions of the Federal Employers' Liability Act of 1908, petitioner, Philadelphia, Baltimore and Washington Railroad Company, within the three months allowed by statute (act of September 6, 1916; 39 Stats., 746) filed in this Court on the 27th day of May, A. D. 1918, its petition for writ of certiorari, and as authorized by the provisions of paragraph 4 of Rule 37 of the Rules of Practice of this Honorable Court and strictly complying in every respect with the requirements of said rule, gave and served notice upon opposing counsel of intention to submit said petition to this Court on Monday, October 7, 1918, or so soon thereafter as counsel may be heard, said date offering the first motion day occurring after the expiration of four weeks from date of filing said petition.

4. Subsequent to the entry by the Court of Appeals of Maryland of its said judgment of affirmance, and prior to the filing in this court of said petition for certiorari, that is, on the 21st day of March, 1918, the President of the United States approved "An act to provide for the operation of transportation systems while under Federal control," &c., &c., section 10 whereof provides that while action at law and suits in equity "may be brought by and against carriers under Federal control" (petitioner being of such carriers), "and judgments rendered as now provided by law," never-

theless "no process, mesne or final, shall be levied against any property under such Federal control."

5. Notwithstanding all of the above the respondent Alfred H. Smith, by his attorneys of record, have demanded and are continuing to demand payment of the judgment hereinbefore described, and threaten to issue execution and to levy same upon the property of your petitioner, irrespective of the prohibitions of said statute of May 21, 1918, and of the pendency of the petition for writ of certiorari herein.

Wherefore petitioner moves for the entry of an order herein directing the staying of execution of the judgment of the Circuit Court for Caroline County hereinbefore complained of, until such time as this Court proceeding in due course under its Rules of Practice shall first have considered and disposed of the petition for writ of certiorari herein.

FREDERIC D. McKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for Petitioner.

STACY B. LLOYD,
HENRY R. LEWIS,
Of Counsel.

Statement of Character of Case.

This is an action brought by Smith against the Philadelphia, Baltimore and Washington Railroad Company under the provisions of the Federal Employers' Liability Act of 1908, and the novel question presented in the case is whether Smith, who was a cook and camp-car cleaner for a gang of bridge carpenters engaged in repairing a bridge on defendant's line used in interstate commerce, was himself so connected with such commerce as to entitle him to recover for injuries received while he was "basting a big turkey" in the camp car which was on a side-track where it had been

lying for three weeks, the bridge carpenters and the bridge under repairs being considerable distance away; beyond the preparation of the food and the cleaning of the camp car, the plaintiff Smith having no connection with either.

JOHN SPALDING FLANNERY,
FREDERIC D. McKENNEY,
Attorneys for Petitioner.

(37724)

PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY *v.* SMITH.

CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

No. 472. Argued April 15, 1919.—Decided May 19, 1919.

An employee of an interstate railroad whose duties were to cook the meals, make the beds, etc., for a gang of bridge carpenters, in a camp car which was provided and moved from place to place along the railroad line to facilitate their work in repairing the bridges, and who, at the time of his injury, was within the car, on a side-track, and occupied in cooking a meal for the carpenters and himself while they were repairing one of the bridges in the vicinity, *held*, engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act.

132 Maryland, 345, affirmed.

THE case is stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. John Spalding Flannery* was on the briefs, for petitioner.

Mr. T. Alan Goldsborough for respondent.

MR. JUSTICE PITNEY delivered the opinion of the court.

Respondent brought his action in a state court of Maryland under the provisions of the Federal Employers' Liability Act of April 22, 1908, as amended April 5, 1910 (c. 149, 35 Stat. 65; c. 143, 36 Stat. 291), to recover damages for personal injuries sustained by him upon one of petitioner's lines of railroad in the State of Maryland over which petitioner was engaged in transporting interstate as well as intrastate commerce.

Plaintiff was employed by defendant in connection with a gang of bridge carpenters, who were employed by defendant in the repair of the bridges and bridge abutments upon said line of railway. The gang, including plaintiff, worked over the entire line, and were moved from point to point as the repair work required in what was called a "camp car," furnished and moved by defendant, in which they ate, slept, and lived. Plaintiff's principal duties were to take care of this car, keep it clean, attend to the beds, and prepare and cook the meals for himself and the other members of the gang. On December 23, 1915, the bridge carpenters were engaged in repairing a bridge abutment on defendant's line near Easton, Maryland, and the camp car was on defendant's side-track at Easton; and while plaintiff was in the car, engaged in cooking a meal for the bridge carpenters and himself, the engineer of one of defendant's trains, without warning, ran the engine upon the side-track and against a car to which the camp car was coupled with such force that plaintiff received injuries, to recover for which his action is brought.

A judgment in plaintiff's favor was affirmed by the Maryland Court of Appeals (132 Maryland, 345), and the case comes here on a writ of certiorari.

The only question we have to consider is whether plaintiff at the time he was injured was engaged in interstate commerce within the meaning of the statute. Petitioner, citing *Illinois Central R. R. Co.* v. *Behrens*, 233 U. S. 473, 478, and *Erie R. R. Co.* v. *Welsh*, 242 U. S. 303, 306, as conclusive to the effect that the true test is the nature of the work being done by the employee at the time of the injury, and that what he had been doing before and expected to do afterwards is of no consequence, argues that since plaintiff at the time of the injury and for some weeks prior thereto was and had been working as mess cook and camp cleaner or attendant for a gang of bridge carpenters who were quartered "for their own convenience"

in a camp car belonging to petitioner, which was not being moved in interstate commerce, but was located and standing on a switch track in the neighborhood of the bridge upon which the carpenters then were and for some weeks prior thereto had been and for some time afterwards were working; and since plaintiff at the moment of the injury was engaged in cooking food which was the property of himself and the carpenters, he was not at the time engaged in interstate commerce.

As thus stated, the relation of plaintiff's work to the interstate commerce of his employer would seem to be rather remote. But upon a closer examination of the facts the contrary will appear. Taking it to be settled by the decision of this court in *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 152, that the repair of bridges in use as instrumentalities of interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it, it of course is evident that the work of the bridge carpenters in the present case was so closely related to defendant's interstate commerce as to be in effect a part of it. The next question is, what was plaintiff's relation to the work of the bridge carpenters? It may be freely conceded that if he had been acting as cook and camp cleaner or attendant merely for the personal convenience of the bridge carpenters, and without regard to the conduct of their work, he could not properly have been deemed to be in any sense a participant in their work. But the fact was otherwise. He was employed in a camp car which belonged to the railroad company, and was moved about from place to place along its line according to the exigencies of the work of the bridge carpenters, no doubt with the object and certainly with the necessary effect of forwarding their work, by permitting them to conduct it conveniently at points remote from their homes and remote from towns where proper board and lodging were to be had.

The circumstance that the risks of personal injury to which plaintiff was subjected were similar to those that attended the work of train employees generally and of the bridge workers themselves when off duty, while not without significance, is of little moment. The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. If, instead, he had brought their meals to them daily at the bridge upon which they happened to be working, it hardly would be questioned that his work in so doing was a part of theirs. What he was in fact doing was the same in kind, and did not differ materially in degree. Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act.

Judgment affirmed.